

No. _____

83-6736

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1983

Supreme Court, U.S.

FILED

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ORIGINAL

TERRY MELVIN SIMS

Petitioner,

vs.

STATE OF FLORIDA

Respondent.

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SUPREME COURT, U.S.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

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QUESTION PRESENTED

WHETHER THE TRIAL JUDGE IN THIS CAPITAL CASE COMMITTED ERROR OF CONSTITUTIONAL MAGNITUDE IN RESTRICTING AND ULTIMATELY CUTTING OFF ALTOGETHER DEFENSE COUNSEL'S CROSS-EXAMINATION OF THE KEY PROSECUTION WITNESS.

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PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida filed on November 3, 1983.

CITATION TO OPINIONS BELOW

The judgment upon which petitioner seeks plenary review is the decision of the Supreme Court of Florida upholding his conviction and death sentence. The opinion of the Florida Supreme Court was issued on November 3, 1983 and was modified on denial of rehearing on January 19, 1984. The revised opinion of the Supreme Court of Florida is reported as Sims v. State, 444 So.2d 922 (Fla. 1983) and is set out as Appendix B to this petition. The order denying rehearing is attached as Appendix C.

JURISDICTION

The judgment of the Supreme Court of Florida was filed on November 3, 1983, and rehearing was denied on January 19, 1984. See Appendix D. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting herein deprivation of rights secured by the Constitution of the United States. The Honorable Lewis F. Powell, Jr., Associate Justice of the Supreme Court of the United States, issued an order extending the time within which to file this petition to and including April 18, 1984.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States. It further involves Section 921.141, Florida Statutes (1977), entitled "Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence." Because of its length, the statute is set out in its entirety in Appendix A.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Defense counsel timely objected when the trial court summarily cut off cross-examination of the state's key witness (R 468); counsel had twice been rebuked in his requests for bench conferences during the cross-examination (R 460-61, 462). The question was then raised in Point I of petitioner's brief on direct appeal to the Supreme Court of Florida, where he alleged that "the trial court erred in summarily curtailing appellant's cross-examination of the key prosecution witness." The Florida Supreme Court, in its initial opinion dated November 3, 1983, concluded that trial counsel's objection was insufficient to preserve the issue for appellate review. See Appendix D. Mr. Sims challenged this finding in his timely filed petition for rehearing. Id. The Florida Supreme Court agreed and modified its opinion accordingly. Id. That court's final opinion clearly resolved the issue on the merits:

Appellant's first point on appeal is that he was denied his sixth amendment right to cross-examine a witness when the trial court curtailed defense counsel's cross-examination of Baldree. He relies on Coxwell v. State, 361 So.2d 148 (Fla. 1978). The asserted error occurred when defense counsel began questioning Baldree about the individual whom appellant was said to resemble. We do not find that the court's ruling was a curtailment of cross-examination requiring reversal under Coxwell v. State. Here the defense was allowed extensive cross-examination of the witness and the state's objection and the court's ruling thereon came only after the defense went into matters beyond the scope of Baldree's direct testimony. The defense did not ask for an opportunity to make a proffer to show the relevance of the information it was seeking to bring out. We find no error in the judge's ruling.

Sims v. State, 444 So.2d 922, 924 (Fla. 1983).

STATEMENT OF THE CASE

Terry Melvin Sims was convicted and sentenced to death for the murder of George Pfiel, an off-duty deputy sheriff who entered a pharmacy while it was being robbed by four men. The conviction and sentence were affirmed by the Florida Supreme Court. Sims v. State, 444 So.2d 922 (Fla. 1983). This petition followed.

Because resolution of the question presented requires understanding of the significance of the testimony of Curtis Baldree, in the context of all the evidence presented at trial, that evidence must be discussed in some detail.

A. The State's Case.

Two of the participants in the robbery, Curtis Baldree and B. B. Halsell, were "the state's chief witnesses." Sims v. State, 444 So.2d 922, 923 (Fla. 1983). Both received deals for their testimony. Although originally charged with murder and robbery, Baldree entered into a deal with the state in which he pleaded guilty to two misdemeanors and was sentenced to two years in the county jail (R 445-446).¹ Halsell's deal was that he pleaded guilty to one count of robbery with a ten year cap on his sentence (R 299-300). Baldree and Halsell shared a jail cell while waiting to testify in this case (R 344).

Halsell testified that he met in Jacksonville with Baldree, Sims and one Eugene Robinson (R 302). Driving two cars, a Cadillac and a stolen Matador (R 303), they began driving to Tampa for the purpose of buying ignition pullers (R 304). However, they stopped in Orlando overnight (R 303), and while there they stole a Camaro (R 305-306). Halsell checked into a Quality Inn motel across the road from the pharmacy that eventually was robbed (R 308). After staying at the motel for several hours (R 308), Halsell said, he took Baldree and Sims to pick up the Camaro; Robinson drove the Cadillac (R 310). He said that Robinson had given them all guns (R 313-314) and that the robbery was Robinson's idea (R 332).

¹ The symbols "T" and "R" respectively will be used herein to refer to the transcript of trial proceedings and the record-on-appeal in the Florida Supreme Court below.

Halsell parked the Matador behind the shopping center as a "switch" car (R 311). He said he saw Baldree and Sims enter the pharmacy (R 313). About five minutes later he saw a man walking up to the door of the pharmacy (R 314), saw him peek in the door and then a "bunch of guns went off" (R 315). The man had fired first and then someone inside returned fire (R 315, 351). Halsell said that after the man fell, he saw Sims come out the pharmacy door in a crouch; then Sims went back inside (R 315). Halsell and Robinson then left picked up the Matador and went back to the motel (R 316). According to Halsell, Sims arrived immediately at the motel room and was bleeding (R 317) and said that he "shot a cop or a truck driver" (R 353). The three then left the motel and went to a store to listen to a police scanner (R 317), and then Halsell went back to the motel to check on Baldree (R 318). He found Baldree in the motel, they went back to get the others and then checked into another motel (R 319). After about an hour they departed for Jacksonville where Halsell said they left Sims at Baldree's house and Halsell went to Robinson's house (R 320-321).

Halsell further testified that he had been a drug addict since age 18 (R 301, 325), that he injected morphine on the days prior to and day of the offense (R 326), that he and was a "professional criminal" since he left high school (R 300), that he had five aliases (R 342), that he had committed more than 100 burglaries (R 300) and a few robberies (R 323) mostly for drugs (R 301) and that he had been convicted "several times" (R 354). Halsell told Sims' prior attorney that he would do "whatever he felt was necessary ... to make sure that his sentence was ... what he wanted it to be." (R 659).

Baldree, the other alleged accomplice, also testified. Baldree said that he went into the pharmacy first with Sims behind him (R 432). Baldree went to the back of the store to the pharmacy counter and got the pharmacist (R 433). Baldree said Sims ordered the customers and employees to come to the back of the store and go into the bathroom (R 433-434). Baldree told the pharmacist to give him certain drugs (R 434); Baldree thought he was stalling and cocked his pistol in the pharmacist's face (R

435). He said that Sims came to the back of the store to ask how things were going and then went back to the front (R 435). Baldree said that shooting started at the front (R 435). The pharmacist grabbed Baldree's gun and they wrestled for it; Baldree pulled away and fired his gun (R 436). Baldree said that he then went to the front of the store and the pharmacist went into the bathroom (R 436). According to Baldree, Sims said "I've just killed a cop" and "when he came in the door I thought he was a truck driver" (R437). Baldree testified that Sims said that they had fired simultaneously (R 437). He said Sims was shot in the hip (R 438) and then began crawling towards the front door (R 438). Baldree went out the back door and commandeered a car (R 438). He left the car, ran through the woods toward the Quality Inn, threw his gun in a lake, and went back to the motel where he waited for Halsell (R 438-439). They went to another motel and then to Jacksonville (R 442). Baldree said he took Sims to Baldree's apartment where his girlfriend, Joyce Gray, was also living (R 443). On Sunday morning Robinson came over, according to Baldree, and they took Sims to Sims' trailer in Lake City (R 443). Baldree said that on January 3, 1978 he and Robinson picked up Sims and took him to a Dr. Dunbar in St. Mary's, Georgia (R 444-445). They then returned Sims to Lake City (R 445).

Baldree testified that he had spent twenty-four years in state and federal prisons for crimes including armed robbery, sale of narcotics, attempted murder and escape (R 426-427). He denied being a drug addict (R 446) although he admitted using drugs on the day of the offense (R 451, 452, 459) and other witnesses, including Halsell, described him as a junkie or addict (R 327, 328, 547, 559, 586). He made his living selling drugs (R 448). He had been convicted of crimes "approximately twelve" times (R 466). He agreed to testify in return for pleas of guilty to two misdemeanors (R 445) and told Sims' prior attorney that "he would do just about anything to keep that deal...." (R 659).

The account of the robbery and the shooting was confirmed by Pharmacist Robert Duncan, Duncan's wife and daughter, both of whom worked in the store, and two customers. Mr. Duncan's wife, Caroline Duncan, was working in one of the aisles when her daughter motioned to her to look at a man who was holding a gun (R 388-391). They then went to the back of the store (R 391). She said Sims resembled the man she saw (R 392). Colleen Duncan, their 16-year old daughter, was working at the cash register in front of the pharmacy, and a man, who had been in the store five minutes (R 405), approached her with a gun and told her to go to the back of the store (R 403-405). She said Sims was the man (R 405), although she had failed to pick out his photograph in a prior lineup (R 411-414) and had since seen a picture of Sims in the newspapers (R 414, 419). William Guggenheim was a customer in the store waiting at the pharmacy counter (R 478-479). He saw a man with a gun next to the pharmacist, Mr. Duncan (R 480-481). The man ordered Guggenheim around the counter, but instead Guggenheim ran to the front of the store (R 481-482). He said a man with a gun confronted him and asked for his wallet (R 482-483). Guggenheim then saw a man in a gray suit enter the store and then back out (R 485-486). Guggenheim said Sims was the man with the gun (R 487), although he also had been unable to identify Sims' photograph (R 495-496) and had seen newspaper and television reports (R 499-500). Sue Kovec said she saw Sims in the front of the store (R 503, 505) but she did not see a gun in his hand (R 506). She said she went to the back of the store and stayed by the pharmacy counter (R 503-504).

B. The Defense Case

Bonnie McCumbers testified for the defense that she lived in a trailer in Lake City during the time of this offense (R 596). She lived with Sims (R 596) and testified that Sims was home every night between Christmas and New Year (R 598). Ms. McCumbers went to St. Augustine on January 3rd to pick up her social security check (R 599). On the same day she picked up Robert and June Hart and brought them to her trailer in Lake City (R 599). Ms. McCumbers testified that Sims showed no sign of a gunshot wound (R 599). June Hart testified that on January 3rd

she went to Sims and Ms. McCumbers' trailer in Lake City and stayed along with her husband for several weeks (R 612), because her husband was out of work (R 616). She saw Sims that night and he was walking normally and was not in pain (R 612-613). Also, after Christmas and before New Year's, she telephoned the trailer and Sims answered (R 614). Robert Hart also saw Sims and he was walking normally, with no evidence of a gunshot wound (R 623).

Joyce Gray, Baldree's common law wife (R 557-558), was living with Baldree at the time (R 558). On January 3, 1978, Baldree was with her in Atlanta for Ms. Gray's doctor's appointment (R 560) and was in her presence the entire time (R 565). Sims tried to admit into evidence a gasoline credit card receipt signed by Baldree in Atlanta on that date and the doctor's bill (R 560), but the court would not admit them into evidence (R 564). She also testified that Baldree used drugs daily (R 559). Ms. Gray said that she saw no one staying at their apartment between Christmas and New Year's (R 570).

Ann Robinson, the wife of Gene Robinson, testified that Halsell and Baldree were heavy drug addicts and that Baldree hallucinated constantly (R 545, 547). Baldree was a robber and Halsell was a burglar and a robber (R 548). The two worked as a team (R 548). Sims was not associated with Baldree and Halsell (R 550). Baldree's reputation was dangerous, treacherous and untrustworthy (R 550).

Gale Milliken lived with Halsell for four years (R 585). He and Baldree were thieves and drug addicts (R 585-586) and Baldree hallucinated on drugs (R 587). Halsell and Baldree worked together (R 588). Both Baldree and Halsell had previously falsely accused people of crimes (R 535, 587-588).

Officer Richard Schaffer also testified for the defense. He was the first officer on the scene, and he left his car and went toward the pharmacy (R 523-524). The officer saw the door partially open and a man crouched down inside behind the door (R 525). He saw the man run back through the pharmacy (R 517). After the officer got up to the pharmacy he heard a shot fired (R 527). The officer crouched in front of the pharmacy and within a few minutes a plain clothes deputy sheriff came (R 528-529). The

officer had the deputy take charge (R 529). The officer then went behind the building and tried to overcome an Oldsmobile that had been commandeered (R 529, 530, 532).

Carol Weatherby, a pharmacy technician at the store (R 538), was behind the pharmacy counter with Mr. Duncan at the time she first saw Baldree (R 538-539). She said that when the first shot was fired Guggenheim was in the back of the store (R 541) and that she, Guggenheim and Kovec did not run down the aisle until two other simultaneous shots were fired (R 541).

Ralph Salerno, the chief investigator, testified regarding photographic lineups that he had held (R 645). In the photographic lineup, there were in excess of forty pictures including three photographs of Sims (R 645-646). Sue Kovec picked out Sims (R 646-647), Colleen Duncan, and Mr. Guggenheim did not pick out any photographs (R 647-648). Baldree was shown a photograph of Sims and said he did not know him (R 648-649).

Sims also presented testimony about Terry Wayne Gale. Gale was a criminal associate of Baldree and Halsell in robberies and burglaries (R 549). They were a team (R 566). Sims was not associated with them (R 550). Gale closely resembled Sims in appearance (R 549).

C. The State's Rebuttal

In rebuttal, the State called William George Dunbar, a former doctor who was then in federal prison on tax and narcotics charges (R 665-666). He said that on January 3rd, Gene Robinson brought an injured man to him in St. Mary's, Georgia (R 668). He said the man had an injury on his left hip (R 668). The wound looked old (R 669) and not like a gunshot wound (R 673). The man with the injury had a salt and pepper beard and hair (R 670-671).

REASONS FOR GRANTING THE WRIT

THE TRIAL JUDGE IN THIS CAPITAL CASE RESTRICTED AND ULTIMATELY CUT OFF PETITIONER'S CROSS-EXAMINATION OF THE KEY PROSECUTION WITNESS, IN VIOLATION OF SIXTH AND FOURTEENTH AMENDMENT GUARANTEES OF CONFRONTATION OF WITNESSES AND OF A FAIR TRIAL.

The trial court interjected, and ultimately abruptly terminated entirely, Mr. Sims' cross-examination of the key prosecution witness, alleged accomplice, Curtis Baldree. The

judge's reason for his sua sponte action was not that the questions being asked were improper or that they covered collateral areas.² Rather, the court apparently reasoned that since the witness had testified to these areas on direct examination and since other witnesses had also testified about those areas, Mr. Sims' cross-examination into the matters was repetitive.³ This case thus involves both the restriction of cross-examination into certain areas and the outright termination of cross-examination into any areas.

Mr. Sims will, first, identify the important constitutional issues presented and, second, show why his case is the proper vehicle for resolving those issues.

A. THE ISSUES PRESENTED

"There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Pointer v. Texas, 380 U.S. 400, 405 (1965). The Sixth Amendment, made applicable to the states through the Fourteenth Amendment, id. at 403-05, mandates that a criminal defendant has the right "to be confronted with the witnesses against him." The Court's "cases construing the [confrontation] clause hold that a primary interest served by it is the right of cross-examination." Davis v. Alaska, 415 U.S. 308, 316 (1974) (quoting Douglas v. Alabama, 380 U.S. 415, 418 (1968)); see also Ohio v. Roberts, 448 U.S. 56, 63 (1980). The right of cross-examination is an essential safeguard of fact-finding accuracy in an adversary system of justice and "the principal means by which the believ-

² The prosecution did not object to the questioning.

³ Curiously, the Florida Supreme Court's opinion did not mention the repetitiveness rationale given by the trial. Rather, the State Supreme Court found that the matters excluded on cross were beyond the scope of direct. 444 So.2d at 924. There are two answers to this. First, the trial court excluded the testimony as cumulative, not as beyond the scope of direct. Indeed, the trial judge excluded the interrogation because he deemed it repetitious of matters covered on direct. Second, the questions were squarely within the scope of direct. Mr. Sims develops this point in his discussion of the specific limitations in this case.

ability of a witness and the truth of his testimony are tested." Davis, 415 U.S. at 316. These "means of testing accuracy are so important that the absence of proper confrontation at trial calls into question the ultimate integrity of the fact-finding process." Roberts, 448 U.S. at 65 (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973) and Berger v. California, 393 U.S. 314, 315 (1969)).

One goal of effective cross-examination is to impeach the credibility of opposing witnesses. The Court in Davis observed that

the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness. A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony." We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.

415 U.S. at 317 (citations omitted).

The Court in Davis, while stressing the importance of the right of cross-examination, recognized that a trial judge has discretion⁴ to preclude interrogation that is "repetitive." 415 U.S. at 317. The trial judge in this case justified curtailment of cross-examination by finding the questioning cumulative of information adduced on direct examination and revealed

⁴ It is of course true that the scope of cross-examination is a matter within the discretion of the trial court. But this discretionary authority comes into play only after there has been permitted as a matter of right sufficient cross-examination to satisfy the Sixth Amendment. See United States v. Lindstrom, 698 U.S. 1154, 1160 (11th Cir. 1983); Greene v. Wainwright, 634 F.2d 272, 275 (5th Cir. 1981); United States v. Bass, 490 F.2d 846, 858 n. 12 (5th Cir. 1974).

through other witnesses. This case thus squarely presents the question of the proper scope of the cumulativeness exception to the general rule permitting a full-ranging cross-examination. Specifically, this case asks (1) whether questioning on cross-examination is improperly cumulative if it covers the same ground covered on direct examination of the witness being interrogated;⁵ (2) whether cross-examination is improperly cumulative if it covers the same ground covered by other witnesses;⁶ (3) whether there is a constitutionally significant difference between a court's limitation of cross-examination into certain discrete subject areas and the court's termination of cross-examination altogether into any subject area;⁷ (4) whether a criminal defendant, having shown improper curtailment of cross-examination, must make an additional showing of prejudice in order to make out a violation of the Constitution;⁸ (5)

⁵ See United States v. Caudle, 606 P.2d 451, 456 (4th Cir. 1979).

⁶ See Frost v. State, 104 So.2d 77, 80 (Fla. 2d Dist. Ct. App. 1958).

⁷ Both types of limitation occurred in this case, though the Florida Supreme Court's opinion does not discuss the distinction. See 444 So.2d at 924.

⁸ In Douglas v. Alabama, 380 U.S. at 420, the Court's statement that the case before it "cannot be characterized as one where the prejudice in the denial of the right of cross-examination constituted a mere minor lapse", could be read as requiring a showing of prejudice. And the Florida Supreme Court, in criticizing Mr. Sims' defense counsel for not asking "for an opportunity to make a proffer to show the relevance of the information it was seeking to bring out," 444 So.2d at 924, seemed to imply that a showing of prejudice is required. But in Davis v. Alaska, the Court refused to "speculate as to whether the jury, as sole judge of the credibility of witness, would have accepted" the line of argument asserted by the defense 415 U.S. at 318. The Court concluded that Davis was "denied the right of effective cross-examination which would "be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." Id. at 319 (quoting Brookhart v. Janis, 384 U.S. 1, 3 (1966) and Smith v. Illinois, 390 U.S. 129, 131 (1968)). Similarly, in Alford v. United States, the Court reasoned that

Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply.... It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them.... To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony

whether the fact that this is a capital case, thus mandating a heightened need for reliability, requires special scrutiny of the abrogation of cross-examination?⁹ The remainder of this petition will show why Mr. Sims' case is a proper vehicle for resolution of these important issues.

B. THE VEHICLE

The key witness for the state was Curtis Baldree.¹⁰ Although initially charged with first degree murder and robbery, he was allowed to plead guilty to two misdemeanors in return for his testimony (R 445-446). Baldree testified that he was in the pharmacy conducting the robbery with Sims and he related details of the planning and carrying out of the robbery. Thus, he was an alleged accomplice and unquestionably a very key witness for the prosecution. "The accuracy and truthfulness of [Baldree's] testimony were key elements in the state's case against petitioner." Davis v. Alaska, 415 U.S. at 318. See also United States v. Lindstrom, 698 F.2d at 1163; Greene v. Wainwright, 634 F.2d at 275.

The trial court limited cross-examination of Baldree as "repetitive." The judge never specified precisely what it was repetitive of, but the record of the cross-examination makes clear that counsel was not repeating matters already covered on cross. A reading of the cross-examination reveals plainly that it was orderly and not repetitive. The judge's rulings only make sense if he found repetitiveness in the fact that the defense was questioning in areas covered in the direct examination of Baldree or in the interrogation of other witnesses. And if that is what the judge indeed meant, then his limitations on cross-examination violated the Sixth Amendment.

in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial.

282 U.S. 687, 692 (1931) (citations omitted). See also Davis v. Alaska, 415 U.S. at 318 (noting constitutional dimension of Alford).

⁹ See Coco v. State, 62 So.2d 892, 895 (Fla. 1953); Hahn v. State, 58 So.2d 188, 191 (Fla. 1952); Williams v. State, 386 So.2d 25, 27 (Fla. 2d Dist. Ct. App. 1980).

¹⁰ The Florida Supreme Court noted that Baldree and B. B. Halsell were "the state's chief witnesses" against Sims. Sims v. State, 444 So.2d at 923.

The denial of the right of cross-examination in this case occurred in two general ways. Throughout the cross-examination of Baldree, the judge repeatedly interrupted defense counsel and ordered him to "move on." Finally, the judge cut off cross-examination altogether.

1. Restrictions On What Cross-examination Was Permitted by the Trial Judge.

Throughout defense counsel's cross-examination of Baldree, the trial judge interposed on his own to limit questioning. The judge interrupted and told defense counsel to "move on" more than ten times (in 20 pages of transcript) during his interrogation of this crucial witness (R 456, 460, 461, 462, 463, 466, 468). Five examples suffice to illustrate the limits within which the court permitted cross-examination of Baldree.

First, the judge told defense counsel to "move on" when he was asking Baldree about his ownership of and experience with the gun that Baldree said he used in the robbery and also about the fact that he had fired that weapon at his wife (R 456). Of itself the ownership and uses of the weapon is an aspect of the offense which Sims had an absolute right to probe -- it was testified to in direct examination and was certainly relevant to the offense -- but also at that point counsel was attempting to impeach the witness with an inconsistent statement (R 455). This area of cross-examination is also important since in Baldree's direct examination testimony he had tried to minimize his role in the planning of the offense, almost suggesting it was mere happenstance. Baldree had said it was Robinson's idea and that Robinson furnished the weapons just prior to the robbery (R 428, 430, 433).

The judge interposed a second time while defense counsel was asking Baldree about the purchase and use of certain fingernail polish -- a matter brought out on direct examination (R 428). The following exchange occurred:

Q. [by defense counsel]: And who bought the nail polish?

A. The best I can remember, it was Halsell. 4

THE COURT: Let's move on, Mr. Rabinowitz, please.

MR. RABINOWITZ: [Defense counsel] Okay.

THE COURT: I've had enough of that, Mr. Rabinowitz. Let's move on.. This has gone for enough. Let's move on.

MR. RABINOWITZ: Yes, Your Honor.

MR. HEFFERNAN [Defense]: Your Honor may counsel approach the bench?

THE COURT: No, Move on.

(emphasis supplied) (R 460-61).

Third, Baldree had testified on direct examination that he took Sims to a Dr. Dunbar on January 3, 1978 (R 444). When defense counsel started to inquire the trial judge interrupted and told counsel that the witness had "already testified to all this once" and instructed counsel not to "be so repetitious." The judge then commanded defense counsel to "move on" (R 463). As in the other areas where the judge interrupted, defense counsel's cross-examination was not repetitive, having never inquired into this area. This was an especially significant area of Baldree's testimony since he had said Sims had been wounded in the offense and that is why he took him to the doctor. Baldree's testimony was questionable -- one witness testified that Baldree was in another faraway city on that date (R 560, 565) and Dr. Dunbar (who did not identify Sims) testified for the State that Robinson, not Baldree, took the wounded man to him (R 669-70).

Fourth, the court sustained an objection to defense questioning concerning Terry Wayne Gale, a person discussed by previous and subsequent witnesses at the trial (R 348-49, 549, 569, 589). One theory of the defense was that it was Terry Gale, not Terry Sims, who committed the robbery with Baldree and Halsell. Terry Gale closely resembled Sims in height and hair length and style; Gale was also similar to Sims in general build except that he was a little heavier (R 349, 549). Gale's close resemblance to Sims could have been the cause of the misidentification of Sims. Also, the first officer on the scene said that the perpetrator had a large head (R 526), not a thin head like Sims. Halsell, the other alleged accomplice, had testified that he had been involved in "quite a few crimes" with Gale (R 349) and that he had previously worked in crime with Baldree (R

323-324). All three were from Jacksonville. Other witnesses testified that Gale, Halsell and Baldree were frequent criminal associates (R 548, 549, 556, 588, 590) and that Sims was not associated with them (R 548, 549, 556). Thus, Sims' attempted cross-examination of Baldree regarding Gale involved a central point in this case. The cross-examination also would have revealed bias by showing a motive for Baldree to lie in order to protect his "associate" while at the same time getting a deal by identifying Sims. The cross-examination also would have laid the foundation for impeachment by other contradictory evidence.

Fifth, the judge interrupted defense counsel's attempt to question Baldree about the remarkable deal he received in exchange for his testimony. (R 466). This time, however, not only did the judge preclude questioning and prevent the witness from answering, but the judge himself gave an answer. Again, the judge's reasoning was that counsel could not question in the area because it was "repetitious" (R 466). But Sims had never examined Baldree about the deal he had made. When defense counsel asked Baldree what deal he had received, the judge interrupted to give an answer and to tell counsel to move on:

THE COURT: He testified two misdemeanors he got a year apiece and they are running consecutively. Please Mr. Rabinowitz, let's not be repetitious.

(R 465-466). Baldree had testified on direct examination that he had pleaded guilty to two misdemeanors and that "his part of the deal" was "to tell the truth". (R 445-446).¹¹

¹¹ An alleged accomplice's deal with the state is one of the most important areas affecting the witness's credibility. It is thus one of the areas most strictly guarded by the courts. See, e.g., Davis v. Alaska, 415 U.S. 308 (1974); Cowheard v. State, 365 So.2d 191, 193 (Fla. 3d Dist. Ct. App. 1979); Holt v. State, 378 So.2d 106 (Fla. 5th Dist. Ct. App. 1980); United States v. Mayer, 556 F.2d 245 (5th Cir. 1977). Mr. Sims was denied that right by the trial judge. It is not merely the bare facts that are relevant, as the trial judge assumed. Also highly relevant are the details, expectations, and reasons behind the deal. Equally important is the witness's demeanor in responding to the probing inquiry [Baldree had told Sims' prior attorney that he would do anything to keep the deal. (R 659)].

These examples demonstrate that the trial judge sua sponte¹² restricted Mr. Sims' cross-examination of Baldree.

2. Termination of Cross-examination Altogether.

During the course of defense counsel's cross-examination of Baldree, the trial court abruptly and sua sponte cut off cross-examination altogether.

The judge simply turned to the prosecutor and asked whether he had any further direct examination. The prosecutor said that he did not, and then the judge sent the witness from the stand and courtroom, and called the next witness:

Q. [by defense counsel] And do you know a man by the name of Terwayne Gale?

A. Very vaguely.

Q. Do you know what Mr. Gale looks like, sir?

A. I'm not sure I know him or not.

MR. DICK [prosecutor]: Objection. Irrelevant and immaterial.

¹² The court's remarks themselves were prejudicial and emphasized the error. The trial judge's repeated sua sponte interjections, commands and admonitions to counsel throughout Sims' examination of the key state witness, certainly could have affected the jurors. It could have conveyed to the jury that the judge viewed defense counsel's questions or areas of questioning to be insignificant or irrelevant. An important example is the judge's sua sponte giving an answer and stopping cross-examination when Sims' counsel tried to ask Baldree about the deal he had made for his testimony. See Espositio v. State, 243 So.2d 451 (Fla. 2d Dist. Ct. App. 1971). By giving an answer and stopping inquiry, the probability is great that the judge conveyed to the jury that counsel's question was somehow irrelevant and that the deal Baldree got was of little significance as it related to his credibility.

The judge repeatedly interrupted counsel's cross-examination, telling him to "move on", "I've had enough", and "You move on." These continual interjections, apart from the restriction of examination, at best hindered counsel and could have inhibited counsel from giving full representation to his client. As we have shown, there was no reason for the judge's interjection; defense counsel in no way had been argumentative, obstreperous, or was asking improper questions, and throughout the trial was fully respectful to the court. The influence of the trial judge on the jury is "immense, Skelton v. Beall, 133 So.2d 477, 481 (Fla. 3d Dist. Ct. App. 1961); accord Raulerson v. State, 102 So.2d 281 (Fla. 1958), especially in the trial of a capital case, Williams v. State, 143 So.2d 484, 488 (Fla. 1962). Accordingly the Florida Supreme Court has recognized:

[A] trial court should avoid making any remark within the hearing of the jury that is capable directly or indirectly, expressly, inferentially, or by innuendo of conveying any intimation as to what view he takes of the case or that intimates his opinion as to the weight, character, or credibility of any evidence adduced.

Leavine v. State, 109 Fla. 447, 147 So. 897, 903 (1933); accord Seward v. State, 59 So.2d 529 (Fla. 1952).

THE COURT: The objection is sustained.
Any further direct?

MR. DICK: No, sir.

THE COURT: Fine. You may come down, sir.
Your next witness.

MR. DICK: The State calls Judith Thompson,
Your Honor.

THE COURT: Judith Thompson, please.

(Emphasis supplied) (R 467-68). Defense counsel at that point requested a bench conference and entered his objection to the judge "having cut short" the cross-examination of Baldree (R 468). It was pointed out that "impeachment" of the witness, and "his character and all those things about which he has knowledge which are relevant to this case are at issue before this jury." (R 468). The trial judge refused to consider counsel's arguments: "Because of the repetitiveness I refuse to allow this case to be dragged out interminably." (R 468-470). The judge said "he's made his point three or four times, and the Court considers that more than sufficient" (R 470).

Thus, this case involves not only the restriction of the scope of cross-examination. It also involves the abrupt termination of any cross-examination.

C. CONCLUSION

In this capital case, the trial judge limited relevant cross-examination of a key prosecution witness and then cut off cross-examination altogether. The only reason for this curtailment of the fundamental right of cross-examination was that the interrogation was "repetitive" of areas covered in the direct examination of the witness and in the interrogation of other witnesses. The Court should grant plenary review to determine whether such questioning is indeed "repetitive" under the test articulated in Davis v. Alaska.

Respectfully submitted,

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15th Judicial Circuit of Florida
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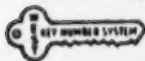
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MICHAEL A. MELLO
Assistant Public Defender

BY 

CRAIG S. BARNARD

Counsel for Petitioner



Terry Melvin SIMS, Appellant,

v.

STATE of Florida, Appellee.

No. 57510.

Supreme Court of Florida.

Nov. 3, 1983.

Rehearing Denied Jan. 19, 1984.

Defendant was convicted in the Circuit Court, Seminole County, Tom Waddell, Jr., J., of first-degree murder and robbery, and he appealed. The Supreme Court, Boyd, J., held that: (1) trial court's sustaining of State's objection to certain questioning of a State's witness during cross-examination by defense was not a curtailment of cross-examination requiring reversal; (2) trial judge did not abuse his discretion in denying defendant's request for an evidentiary hearing on whether the exclusion of potential jurors unalterably opposed to the death penalty resulted in a jury predisposed toward conviction; (3) trial court did not err in refusing to allow further questioning of a juror in a posttrial hearing about whether the jurors had considered defendant's not testifying in reaching their verdict; (4) no prejudice arose from denial of defendant's motion to require the State to elect one of two counts submitted to jury; and (5) despite trial court's erroneous findings as to some aggravating circumstances, sufficient aggravating circumstances remained to support sentence of death.

Affirmed.

1. Criminal Law ⇨1936.2

Trial court's ruling sustaining the State's objection to defense counsel's questioning of a State's witness was not a curtailment of cross-examination requiring reversal where the defense was allowed extensive cross-examination of the witness and the State's objection and the court's ruling thereon came only after the defense went into matters beyond the scope of the witness' direct testimony and the defense did not ask for an opportunity to make a proffer to show the relevance of the information it was seeking to bring out.

2. Criminal Law ⇨1169.11

Vague reference by a defense witness to the use of defendant's "mug shot" in a photographic display did not specifically refer to a prior conviction and was not so prejudicial as to require a new trial.

3. Witnesses ⇨414(1)

In prosecution for first-degree murder and robbery, trial judge did not err in excluding from evidence documents corroborative of defense witness' testimony, in that the documents were superfluous to the witness' testimony and were not relevant to a material issue of fact.

4. Criminal Law ⇨1030(1)

Defendant failed to preserve issue for appeal by failing to object at trial.

5. Jury ⇨33(2.1)

In prosecution for first-degree murder and robbery, trial judge did not abuse its discretion by not granting defendant's request for an evidentiary hearing on whether the exclusion of potential jurors unalterably opposed to the death penalty results in a jury predisposed toward conviction.

6. Criminal Law ⇨868

A juror's testimony is relevant only if it concerns matters that do not essentially inhere in the verdict itself.

7. Criminal Law ⇨857(3)

A jury's consideration of a defendant's failure to testify is not the same as considering evidence outside the record, but

rather is an example of its misunderstanding or not following the instructions of the court and such misunderstanding is a matter which essentially inheres in the verdict itself.

8. Criminal Law § 868

Trial court did not err in refusing to allow further questioning of juror in a post-trial hearing about whether the jurors had considered defendant's not testifying in reaching their verdict, in that the record showed that the jury was properly instructed that the State had the burden of proving defendant's guilt and that defendant was not required to respond.

9. Criminal Law § 1166(1)

In prosecution for first-degree murder and robbery, no prejudice arose from the trial court's denial of defendant's motion to require the State to elect between counts of felony-murder of the victim based upon the robbery of one person and a second count charging felony-murder of the victim based on the robbery of a second person, in that the court in effect consolidated the two verdicts by entering judgment of conviction for a single offense of first-degree murder.

10. Criminal Law § 1177

In capital prosecution in which there were no mitigating circumstances found at the sentencing stage, two instances of the trial court giving improper double consideration of or giving separate effect to similar statutory aggravating circumstances was harmless error. West's F.S.A. § 921.141(5)(b-h).

11. Criminal Law § 1177

In capital prosecution in which there were no mitigating circumstances, the erroneous finding that the murder was heinous, atrocious, or cruel was harmless error, in light of remaining aggravating circumstances. West's F.S.A. § 921.141(5)(b-h).

12. Criminal Law § 1208.1(4)

In capital prosecutions in which there are some aggravating and no mitigating circumstances, death is presumed to be the appropriate punishment. West's F.S.A. § 921.141(5)(b-h).

Richard L. Jorandby, Public Defender and Craig S. Barnard, Chief Asst. Public Defender, Fifteenth Judicial Circuit, West Palm Beach, for appellant.

Jim Smith, Atty. Gen., and James Dickson Crock, Mark C. Menser and Richard B. Martell, Asst. Attys. Gen., Daytona Beach, for appellee.

BOYD, J.

This case is an appeal from judgments of conviction for first-degree murder and robbery and a sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

Terry Melvin Sims was convicted for the first-degree murder of George Pfeil, an off-duty deputy sheriff who entered a pharmacy while it was being robbed by Sims and three other men. Two of these other participants, Curtis Baldree and B.B. Halsell, were the state's chief witnesses. They testified that Sims and Baldree armed themselves with pistols and entered the pharmacy, while Halsell and the fourth participant, Gene Robinson, waited in a car a short distance away. Baldree said that he went to the back of the store to rob the pharmacist while Sims stayed at the front of the store watching the door. Sims ordered the customers and employees to the back of the store and into the bathroom. When Pfeil came into the store he and Sims exchanged gunfire. Pfeil was shot twice and Sims was wounded in the hip. Sims and Baldree escaped the scene and later joined their accomplices. The four men then departed the area.

This account of the robbery and the shooting was confirmed by pharmacist Robert Duncan, Duncan's wife and daughter both of whom worked at the store, and two customers who identified appellant. One of the customers, William Guggenheim, testified that he tried to leave the store when he saw a man pointing a gun at the pharmacist. He was stopped by Sims who took his wallet. Guggenheim said he then saw Sims shoot a man who was entering through the front door.

The main theory of defense was mistaken identity. The defense attempted to discredit Baldree and Halsell on the basis of their bad character, drug addiction, criminal records, and the plea arrangements between them and the state. The defense attacked the identification testimony of one of the customers as the product of a suggestive photographic line-up and questioned the testimony of Guggenheim on the basis of his earlier failure to choose appellant from a photographic line-up. The defense then presented evidence of appellant's resemblance to another individual said to be a frequent criminal associate of Baldree and Halsell.

The jury returned verdicts of guilty of first-degree murder and robbery. At the sentencing phase, the state presented a certified copy of a 1971 Orange County conviction for assault with intent to rob. The defense presented witnesses who testified to appellant's good character and difficult background circumstances. The jury recommended death. Finding several aggravating circumstances and no mitigating circumstances, the trial judge adopted this recommendation.

[1] Appellant's first point on appeal is that he was denied his sixth amendment right to cross-examine a witness when the trial court curtailed defense counsel's cross-examination of Baldree. He relies on *Corwell v. State*, 361 So.2d 148 (Fla.1978). The asserted error occurred when defense counsel began questioning Baldree about the individual whom appellant was said to resemble. We do not find that the court's ruling was a curtailment of cross-examination requiring reversal under *Corwell v. State*. Here the defense was allowed extensive cross-examination of the witness and the state's objection and the court's ruling thereon came only after the defense went into matters beyond the scope of Baldree's direct testimony. The defense did not ask for an opportunity to make a proffer to show the relevance of the information it was seeking to bring out. We find no error in the judge's ruling.

[2] Next appellant argues that the trial judge should have granted his motion for mistrial when a witness mentioned using appellant's "mug shot" in a photographic display. Since these words were used by a defense witness and did not specifically refer to a prior conviction, we find that this vague reference to other possible criminal activity was not so prejudicial as to require a new trial. See *Straight v. State*, 397 So.2d 903 (Fla.), cert. denied, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981).

[3] Appellant also claims the trial judge erred in excluding from evidence documents corroborative of a defense witness's testimony. Since the documents were superfluous to the witness's testimony and were not relevant to a material issue of fact, we find this point to be without merit.

[4] Next appellant argues that the prosecutor made several improper comments during his closing argument. Since appellant failed to object at the trial, he has failed to preserve this point for appeal. *State v. Cumbie*, 380 So.2d 1031 (Fla.1980); *Clark v. State*, 363 So.2d 331 (Fla.1978).

[5] Appellant's fifth point on appeal is that the trial judge erred by not granting his request for an evidentiary hearing on whether the exclusion of potential jurors unalterably opposed to the death penalty results in a jury predisposed toward conviction. We have held that a defendant is not entitled to have jurors serve on his jury who are unalterably opposed to the death penalty and that a trial judge may excuse such jurors for cause. *Maggard v. State*, 399 So.2d 973 (Fla.), cert. denied, 454 U.S. 1059, 102 S.Ct. 610, 70 L.Ed.2d 598 (1981); *Riley v. State*, 366 So.2d 19 (Fla.1978). Since we have previously determined as a matter of law that there is no constitutional infirmity with excluding jurors who because of personal beliefs could not render a verdict of guilty in a capital felony case, the trial judge did not abuse his discretion in denying the request for an evidentiary hearing.

[6-8] Next appellant complains that he was prevented from further questioning a

juror in a post-trial hearing about whether the jurors had considered appellant's not testifying in reaching their verdict. The general rule in Florida is that a juror's testimony is relevant only if it concerns matters which do not essentially inhere in the verdict itself. *Russ v. State*, 95 So.2d 594 (Fla.1957); *Parker v. State*, 336 So.2d 426 (Fla. 1st DCA), *appeal dismissed*, 341 So.2d 292 (Fla.1976). A jury's consideration of a defendant's failure to testify is not the same as considering evidence outside the record, but is rather an example of its misunderstanding or not following the instructions of the court. Such misunderstanding is a matter which essentially inheres in the verdict itself. *Russ v. State*; *Parker v. State*. We find from the record that the jury was properly instructed that the state has the burden of proving the defendant's guilt and that the defendant is not required to respond. Therefore the court did not err in refusing to allow further questioning of the juror.

[9] Appellant's final argument concerning the guilt phase of the trial is that the trial judge erred in allowing the jury to return verdicts on multiple and inconsistent counts. In one count appellant was charged with premeditated murder or felony-murder of Pfeil based upon the robbery of Duncan. In a second count he was charged with premeditated murder or felony-murder of Pfeil based on the robbery of Guggenheim. Appellant filed a motion to require the state to elect one or the other count on the ground that since there was only one killing he could be found guilty at the very most of only one murder. The trial court denied the motion, finding there was no necessary inconsistency between the two verdicts. We agree with this ruling. See *Reed v. State*, 94 Fla. 32, 113 So. 630 (1927). In essence, the crime of murder was charged by alternative counts of the indictment. The court in effect consolidated the two verdicts by entering judgment of conviction for a single offense of first-degree murder. No prejudice arose from the denial of the motion to elect.

We now consider whether the trial judge properly imposed a sentence of death. As was stated above, the jury recommended the capital sentence. As aggravating circumstances, the trial judge found that appellant had previously been convicted of a felony involving the use or threat of violence, citing a previous conviction for assault with intent to rob and a previous conviction for robbery, section 921.141(5)(b), Florida Statutes (1977); that appellant created a great risk of death to many persons, section 921.141(5)(c); that the capital felony was committed in the course of or in the attempt to commit or in flight after committing a robbery, section 921.141(5)(d); that the murder of the uniformed deputy sheriff was committed for the purpose of avoiding arrest, section 921.141(5)(e); that the murder was motivated by pecuniary gain, section 921.141(5)(f); that the murder was committed to disrupt or hinder the enforcement of the law, section 921.141(5)(g); and that the murder was especially heinous, atrocious, or cruel, section 921.141(5)(h). Finding no statutory mitigating circumstances, the trial judge found that the aggravating circumstances outweighed any mitigating considerations.

Appellant points out several errors in the judge's findings. One is that the judge should not have given separate consideration to circumstances (d), commission during a robbery, and (f), commission for pecuniary gain. *Provence v. State*, 337 So.2d 783 (Fla.1976), *cert. denied*, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). Nor should the judge have considered as separate aggravating circumstances (e), avoiding arrest, and (g), hindering law enforcement. *Clark v. State*, 379 So.2d 97 (Fla. 1979), *cert. denied*, 450 U.S. 936, 101 S.Ct. 1402, 67 L.Ed.2d 371 (1981). The judge also erred in finding that this murder was especially heinous, atrocious, or cruel. E.g., *Maggard v. State*; *Lewis v. State*, 377 So.2d 640 (Fla.1979); *Cooper v. State*, 336 So.2d 1133 (Fla.1976), *cert. denied*, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977).

[10, 11] Since there were no mitigating circumstances, the two instances of improper double consideration of or giving separate effect to similar statutory aggravating circumstances may be regarded as harmless error. We will simply consolidate the separate statutory factors so as to accord them their proper weight. The double recitation of proven factors does not call the propriety of the sentence into question unless it interferes with the mandated process of weighing the circumstances. *Hargrave v. State*, 366 So.2d 1 (Fla.1978), cert. denied, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979). Similarly, the erroneous finding that the murder was heinous, atrocious, or cruel may be considered harmless error. *Armstrong v. State*, 399 So.2d 953 (Fla.1981).

[12] Despite these errors, therefore, we find that death is still the appropriate penalty. It was properly determined that the capital felony was committed in the course of a robbery, that it was committed for the purpose of avoiding arrest, and that appellant had previously been convicted of life-threatening crimes. Where there are some aggravating and no mitigating circumstances, death is presumed to be the appropriate punishment. *State v. Dixon*, 283 So.2d 1 (Fla.1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Therefore, despite the judge's erroneous consideration of some of the aggravating circumstances, there remain several other aggravating circumstances properly found which support the sentence of death.

The judgments of conviction and the sentence of death are affirmed.

It is so ordered.

ALDERMAN, C.J., and ADKINS, BOYD, OVERTON, McDONALD and EHRLICH, JJ., concur.



**TAMPA-HILLSBOROUGH COUNTY
EXPRESSWAY AUTHORITY,**

Petitioner,

v.

**K.E. MORRIS ALIGNMENT SERVICE,
INC.,** Respondent.

No. 62281.

Supreme Court of Florida.

Nov. 10, 1983.

Rehearing Denied Feb. 22, 1984.

Appeal was taken from judgment of the Circuit Court for Hillsborough County, James A. Lenfestey, J., denying business damages to landowner in connection with partial taking. The District Court of Appeal, 414 So.2d 299, reversed, and the condemnor appealed. The Supreme Court, Boyd, J., held that as a prerequisite to an award of business damages under statute, business must have been in operation at the location for which business damages are claimed for more than five years.

Decision of District Court of Appeal quashed; remanded with instructions.

Adkins, J., dissented.

1. Eminent Domain — 122

Although power of eminent domain is inherent feature of sovereign authority of state, Constitution limits this power by requiring that full compensation be paid to owner for property taken. West's F.S.A. Const. Art. 10, § 6(a).

2. Eminent Domain — 90, 107

The payment of compensation for intangible losses and incidental or consequential damages in connection with exercise of eminent domain power, including business damages claimed as a result of taking of property adjacent to business, is not required by State Constitution, but is granted or withheld simply as a matter of legislative grace. West's F.S.A. Const. Art. 10, § 6(a).

IN THE SUPREME COURT OF FLORIDA

THURSDAY, JANUARY 19, 1984

TERRY MELVIN SIMS,

**

Appellant,

**

CASE NO. 57,510

vs.

**

Circuit Court Case No. 78-363-CFA
(Seminole)

STATE OF FLORIDA,

**

Appellee.

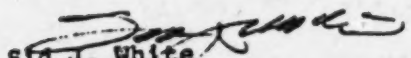
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The opinion filed November 3, 1983, has been revised.

The motion for rehearing and response thereto, having been considered in light of the revised opinion, is hereby denied.

A True Copy

TEST:


Sid J. White
Clerk Supreme Court

C
cc: Hon. Arthur H. Beckwith, Jr., Clerk
Hon. Tom Waddell, Jr., Judge

Craig S. Barnard, Esquire
Richard B. Martell, Esquire
Hon. Jim Smith

RECEIVED

JAN 23 1984

PUBLIC DEFENDERS OFFICE
APPELLATE DIVISION

Supreme Court of Florida

RECEIVED

No. 57,510

NOV - 7 1983
JUDICIAL DEFENDERS OFFICE
APPELLATE DIVISION
15th JUDICIAL CIRCUIT

TERRY MELVIN SIMS, Appellant,

vs.

STATE OF FLORIDA, Appellee.

[November 3, 1983]

PER CURIAM.

This case is an appeal from judgments of conviction for first-degree murder and robbery and a sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

Terry Melvin Sims was convicted for the first-degree murder of George Pfeil, an off-duty deputy sheriff who entered a pharmacy while it was being robbed by Sims and three other men. Two of these other participants, Curtis Baldree and B. B. Halsell, were the state's chief witnesses. They testified that Sims and Baldree armed themselves with pistols and entered the pharmacy, while Halsell and the fourth participant, Gene Robinson, waited in a car a short distance away. Baldree said that he went to the back of the store to rob the pharmacist while Sims stayed at the front of the store watching the door. Sims ordered the customers and employees to the back of the store and into the bathroom. When Pfeil came into the store he and Sims exchanged gunfire. Pfeil was shot twice and Sims was wounded in the hip. Sims and Baldree escaped the scene and later joined their accomplices. The four men then departed the area.

This account of the robbery and the shooting was confirmed by pharmacist Robert Duncan, Duncan's wife and daughter both of

whom worked at the store, and two customers who identified appellant. One of the customers, William Guggenheim, testified that he tried to leave the store when he saw a man pointing a gun at the pharmacist. He was stopped by Sims who took his wallet. Guggenheim said he then saw Sims shoot a man who was entering through the front door.

The main theory of defense was mistaken identity. The defense attempted to discredit Baldree and Halsell on the basis of their bad character, drug addiction, criminal records, and the plea arrangements between them and the state. The defense attacked the identification testimony of one of the customers as the product of a suggestive photographic line-up and questioned the testimony of Guggenheim on the basis of his earlier failure to choose appellant from a photographic line-up. The defense then presented evidence of appellant's resemblance to another individual said to be a frequent criminal associate of Baldree and Halsell.

The jury returned verdicts of guilty of first-degree murder and robbery. At the sentencing phase, the state presented a certified copy of a 1971 Orange County conviction for assault with intent to rob. The defense presented witnesses who testified to appellant's good character and difficult background circumstances. The jury recommended death. Finding several aggravating circumstances and no mitigating circumstances, the trial judge adopted this recommendation.

Appellant's first point on appeal is that he was denied his sixth amendment right to cross-examine a witness when the trial court curtailed defense counsel's cross-examination of Baldree. The asserted error occurred when defense counsel began questioning Baldree about the individual whom appellant was said to resemble. The record reveals, however, that when the court sustained the state's objection to the questioning, the defense acquiesced in the ruling. It was only after the state had called its next witness that the defense raised the matter of having been "cut short" in cross-examination. Therefore the issue was

not sufficiently raised and preserved for review on appeal. Moreover, we disagree with the argument that the court's ruling was a curtailment of cross-examination requiring reversal under Coxwell v. State, 361 So.2d 148 (Fla. 1978). Here the defense was allowed extensive cross-examination of the witness and the state's objection and the court's ruling thereon came only after the defense went into matters beyond the scope of Baldree's direct testimony. The defense did not ask for an opportunity to make a proffer to show the relevance of the information it was seeking to bring out. We find no error in the judge's ruling.

Next appellant argues that the trial judge should have granted his motion for mistrial when a witness mentioned using appellant's "mug shot" in a photographic display. Since these words were used by a defense witness and did not specifically refer to a prior conviction, we find that this vague reference to other possible criminal activity was not so prejudicial as to require a new trial. See Straight v. State, 397 So.2d 903 (Fla.), cert. denied, 454 U.S. 1022 (1981).

Appellant also claims the trial judge erred in excluding from evidence documents corroborative of a defense witness's testimony. Since the documents were superfluous to the witness's testimony and were not relevant to a material issue of fact, we find this point to be without merit.

Next appellant argues that the prosecutor made several improper comments during his closing argument. Since appellant failed to object at the trial, he has failed to preserve this point for appeal. See State v. Cumble, 380 So.2d 1031 (Fla. 1980); Clark v. State, 363 So.2d 331 (Fla. 1978).

Appellant's fifth point on appeal is that the trial judge erred by not granting his request for an evidentiary hearing on whether the exclusion of potential jurors unalterably opposed to the death penalty results in a jury predisposed toward conviction. We have held that a defendant is not entitled to have jurors serve on his jury who are unalterably opposed to the death penalty and that a trial judge may excuse such jurors for

cause. Maqqard v. State, 399 So.2d 973 (Fla.), cert. denied, 454 U.S. 1059 (1981); Riley v. State, 366 So.2d 19 (Fla. 1978).

Since we have previously determined as a matter of law that there is no constitutional infirmity with excluding jurors who because of personal beliefs could not render a verdict of guilty in a capital felony case, the trial judge did not abuse his discretion in denying the request for an evidentiary hearing.

Next appellant complains that he was prevented from further questioning a juror in a post-trial hearing about whether the jurors had considered appellant's not testifying in reaching their verdict. The general rule in Florida is that a juror's testimony is relevant only if it concerns matters which do not essentially inhere in the verdict itself. Russ v. State, 95 So.2d 594 (Fla. 1957); Parker v. State, 336 So.2d 426 (Fla. 1st DCA), appeal dismissed, 341 So.2d 292 (Fla. 1976). A jury's consideration of a defendant's failure to testify is not the same as considering evidence outside the record, but is rather an example of its misunderstanding or not following the instructions of the court. Such misunderstanding is a matter which essentially inheres in the verdict itself. Russ v. State; Parker v. State. We find from the record that the jury was properly instructed that the state has the burden of proving the defendant's guilt and that the defendant is not required to respond. Therefore the court did not err in refusing to allow further questioning of the juror.

Appellant's final argument concerning the guilt phase of the trial is that the trial judge erred in allowing the jury to return verdicts on multiple and inconsistent counts. In one count appellant was charged with premeditated murder or felony-murder of Pfeil based upon the robbery of Duncan. In a second count he was charged with premeditated murder or felony-murder of Pfeil based on the robbery of Guggenheim. Appellant filed a motion to require the state to elect one or the other count on the ground that since there was only one killing he could be found guilty at the very most of only one murder.

The trial court denied the motion, finding there was no necessary inconsistency between the two verdicts. We agree with this ruling. See Reed v. State, 94 Fla. 32, 113 So. 630 (1927). In essence, the crime of murder was charged by alternative counts of the indictment. The court in effect consolidated the two verdicts by entering judgment of conviction for a single offense of first-degree murder. No prejudice arose from the denial of the motion to elect.

We now consider whether the trial judge properly imposed a sentence of death. As was stated above, the jury recommended the capital sentence. As aggravating circumstances, the trial judge found that appellant had previously been convicted of a felony involving the use or threat of violence, citing a previous conviction for assault with intent to rob and a previous conviction for robbery, section 921.141(5)(b), Florida Statutes (1977); that appellant created a great risk of death to many persons, section 921.141(5)(c); that the capital felony was committed in the course of or in the attempt to commit or in flight after committing a robbery, section 921.141(5)(d); that the murder of the uniformed deputy sheriff was committed for the purpose of avoiding arrest, section 921.141(5)(e); that the murder was motivated by pecuniary gain, section 921.141(5)(f); that the murder was committed to disrupt or hinder the enforcement of the law, section 921.141(5)(g); and that the murder was especially heinous, atrocious, or cruel, section 921.141(5)(h). Finding no statutory mitigating circumstances, the trial judge found that the aggravating circumstances outweighed any mitigating considerations.

Appellant points out several errors in the judge's findings. One is that the judge should not have given separate consideration to circumstances (d), commission during a robbery, and (f), commission for pecuniary gain. Provence v. State, 337 So.2d 783 (Fla. 1976), cert. denied, 431 U.S. 969 (1977). Nor should the judge have considered as separate aggravating circumstances (e), avoiding arrest, and (g), hindering law

enforcement. Clark v. State, 379 So.2d 97 (Fla. 1979), cert. denied, 450 U.S. 936 (1981). The judge also erred in finding that this murder was especially heinous, atrocious, or cruel. E.g., Maggard v. State; Lewis v. State, 377 So.2d 640 (Fla. 1979); Cooper v. State, 336 So.2d 1133 (Fla. 1976), cert. denied, 431 U.S. 925 (1977).

Since there were no mitigating circumstances, the two instances of improper double consideration of or giving separate effect to similar statutory aggravating circumstances may be regarded as harmless error. We will simply consolidate the separate statutory factors so as to accord them their proper weight. The double recitation of proven factors does not call the propriety of the sentence into question unless it interferes with the mandated process of weighing the circumstances. Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919 (1979). Similarly, the erroneous finding that the murder was heinous, atrocious, or cruel may be considered harmless error. Armstrong v. State, 399 So.2d 953 (Fla. 1981).

Despite these errors, therefore, we find that death is still the appropriate penalty. It was properly determined that the capital felony was committed in the course of a robbery, that it was committed for the purpose of avoiding arrest, and that appellant had previously been convicted of life-threatening crimes. Where there are some aggravating and no mitigating circumstances, death is presumed to be the appropriate punishment. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). Therefore, despite the judge's erroneous consideration of some of the aggravating circumstances, there remain several other aggravating circumstances properly found which support the sentence of death.

The judgments of conviction and the sentence of death are affirmed.

It is so ordered.

ALDERMAN, C.J., ADKINS, BOYD, OVERTON, McDONALD and EHRLICH, JJ., Concur
NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF
FILED, DETERMINED.

IN THE SUPREME COURT OF FLORIDA

THURSDAY, JANUARY 19, 1984

TERRY MELVIN SIMS,

**

Appellant,

**

CASE NO. 57,510

vs.

**

Circuit Court Case No. 78-363-CFA
(Seminole)

STATE OF FLORIDA,

**

Appellee.


**

The opinion filed November 3, 1983, has been revised.

The motion for rehearing and response thereto, having been considered in light of the revised opinion, is hereby denied.

A True Copy

TEST:


Sid J. White
Clerk Supreme Court

C
cc: Hon. Arthur H. Beckwith, Jr., Clerk
Hon. Tom Waddell, Jr., Judge

Craig S. Barnard, Esquire
Richard B. Martell, Esquire
Hon. Jim Smith

RECEIVED

JAN 23 1984

PUBLIC DEFENDERS OFFICE
APPELLATE DIVISION
1. JUDICIAL COUNCIL

Supreme Court of Florida

No. 57,510

TERRY MELVIN SIMS, Appellant,

vs.

STATE OF FLORIDA, Appellee.

[November 3, 1983]

BOYD, J.

This case is an appeal from judgments of conviction for first-degree murder and robbery and a sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

Terry Melvin Sims was convicted for the first-degree murder of George Pfeil, an off-duty deputy sheriff who entered a pharmacy while it was being robbed by Sims and three other men. Two of these other participants, Curtis Baldree and B. B. Halsell, were the state's chief witnesses. They testified that Sims and Baldree armed themselves with pistols and entered the pharmacy, while Halsell and the fourth participant, Gene Robinson, waited in a car a short distance away. Baldree said that he went to the back of the store to rob the pharmacist while Sims stayed at the front of the store watching the door. Sims ordered the customers and employees to the back of the store and into the bathroom. When Pfeil came into the store he and Sims exchanged gunfire. Pfeil was shot twice and Sims was wounded in the hip. Sims and Baldree escaped the scene and later joined their accomplices. The four men then departed the area.

This account of the robbery and the shooting was confirmed by pharmacist Robert Duncan, Duncan's wife and daughter both of

whom worked at the store, and two customers who identified appellant. One of the customers, William Guggenheim, testified that he tried to leave the store when he saw a man pointing a gun at the pharmacist. He was stopped by Sims who took his wallet. Guggenheim said he then saw Sims shoot a man who was entering through the front door.

The main theory of defense was mistaken identity. The defense attempted to discredit Baldree and Halsell on the basis of their bad character, drug addiction, criminal records, and the plea arrangements between them and the state. The defense attacked the identification testimony of one of the customers as the product of a suggestive photographic line-up and questioned the testimony of Guggenheim on the basis of his earlier failure to choose appellant from a photographic line-up. The defense then presented evidence of appellant's resemblance to another individual said to be a frequent criminal associate of Baldree and Halsell.

The jury returned verdicts of guilty of first-degree murder and robbery. At the sentencing phase, the state presented a certified copy of a 1971 Orange County conviction for assault with intent to rob. The defense presented witnesses who testified to appellant's good character and difficult background circumstances. The jury recommended death. Finding several aggravating circumstances and no mitigating circumstances, the trial judge adopted this recommendation.

Appellant's first point on appeal is that he was denied his sixth amendment right to cross-examine a witness when the trial court curtailed defense counsel's cross-examination of Baldree. He relies on Coxwell v. State, 361 So.2d 148 (Fla. 1978). The asserted error occurred when defense counsel began questioning Baldree about the individual whom appellant was said to resemble. We do not find that the court's ruling was a curtailment of cross-examination requiring reversal under Coxwell v. State. Here the defense was allowed extensive cross-examination of the witness and the state's objection and the

court's ruling thereon came only after the defense went into matters beyond the scope of Baldree's direct testimony. The defense did not ask for an opportunity to make a proffer to show the relevance of the information it was seeking to bring out. We find no error in the judge's ruling.

Next appellant argues that the trial judge should have granted his motion for mistrial when a witness mentioned using appellant's "mug shot" in a photographic display. Since these words were used by a defense witness and did not specifically refer to a prior conviction, we find that this vague reference to other possible criminal activity was not so prejudicial as to require a new trial. See Straight v. State, 397 So.2d 903 (Fla.), cert. denied, 454 U.S. 1022 (1981).

Appellant also claims the trial judge erred in excluding from evidence documents corroborative of a defense witness's testimony. Since the documents were superfluous to the witness's testimony and were not relevant to a material issue of fact, we find this point to be without merit.

Next appellant argues that the prosecutor made several improper comments during his closing argument. Since appellant failed to object at the trial, he has failed to preserve this point for appeal. State v. Cumble, 380 So.2d 1031 (Fla. 1980); Clark v. State, 363 So.2d 331 (Fla. 1978).

Appellant's fifth point on appeal is that the trial judge erred by not granting his request for an evidentiary hearing on whether the exclusion of potential jurors unalterably opposed to the death penalty results in a jury predisposed toward conviction. We have held that a defendant is not entitled to have jurors serve on his jury who are unalterably opposed to the death penalty and that a trial judge may excuse such jurors for cause. Maggard v. State, 399 So.2d 973 (Fla.), cert. denied, 454 U.S. 1059 (1981); Riley v. State, 366 So.2d 19 (Fla. 1978). Since we have previously determined as a matter of law that there is no constitutional infirmity with excluding jurors who because of personal beliefs could not render a verdict of guilty in a

capital felony case, the trial judge did not abuse his discretion in denying the request for an evidentiary hearing.

Next appellant complains that he was prevented from further questioning a juror in a post-trial hearing about whether the jurors had considered appellant's not testifying in reaching their verdict. The general rule in Florida is that a juror's testimony is relevant only if it concerns matters which do not essentially inhere in the verdict itself. Russ v. State, 95 So.2d 594 (Fla. 1957); Parker v. State, 336 So.2d 426 (Fla. 1st DCA), appeal dismissed, 341 So.2d 292 (Fla. 1976). A jury's consideration of a defendant's failure to testify is not the same as considering evidence outside the record, but is rather an example of its misunderstanding or not following the instructions of the court. Such misunderstanding is a matter which essentially inheres in the verdict itself. Russ v. State; Parker v. State. We find from the record that the jury was properly instructed that the state has the burden of proving the defendant's guilt and that the defendant is not required to respond. Therefore the court did not err in refusing to allow further questioning of the juror.

Appellant's final argument concerning the guilt phase of the trial is that the trial judge erred in allowing the jury to return verdicts on multiple and inconsistent counts. In one count appellant was charged with premeditated murder or felony-murder of Pfeil based upon the robbery of Duncan. In a second count he was charged with premeditated murder or felony-murder of Pfeil based on the robbery of Guggenheim. Appellant filed a motion to require the state to elect one or the other count on the ground that since there was only one killing he could be found guilty at the very most of only one murder. The trial court denied the motion, finding there was no necessary inconsistency between the two verdicts. We agree with this ruling. See Reed v. State, 94 Fla. 32, 113 So. 630 (1927). In essence, the crime of murder was charged by alternative counts of the indictment. The court in effect consolidated the two

verdicts by entering judgment of conviction for a single offense of first-degree murder. No prejudice arose from the denial of the motion to elect.

We now consider whether the trial judge properly imposed a sentence of death. As was stated above, the jury recommended the capital sentence. As aggravating circumstances, the trial judge found that appellant had previously been convicted of a felony involving the use or threat of violence, citing a previous conviction for assault with intent to rob and a previous conviction for robbery, section 921.141(5)(b), Florida Statutes (1977); that appellant created a great risk of death to many persons, section 921.141(5)(c); that the capital felony was committed in the course of or in the attempt to commit or in flight after committing a robbery, section 921.141(5)(d); that the murder of the uniformed deputy sheriff was committed for the purpose of avoiding arrest, section 921.141(5)(e); that the murder was motivated by pecuniary gain, section 921.141(5)(f); that the murder was committed to disrupt or hinder the enforcement of the law, section 921.141(5)(g); and that the murder was especially heinous, atrocious, or cruel, section 921.141(5)(h). Finding no statutory mitigating circumstances, the trial judge found that the aggravating circumstances outweighed any mitigating considerations.

Appellant points out several errors in the judge's findings. One is that the judge should not have given separate consideration to circumstances (d), commission during a robbery, and (f), commission for pecuniary gain. Provence v. State, 337 So.2d 783 (Fla. 1976), cert. denied, 431 U.S. 969 (1977). Nor should the judge have considered as separate aggravating circumstances (e), avoiding arrest, and (g), hindering law enforcement. Clark v. State, 379 So.2d 97 (Fla. 1979), cert. denied, 450 U.S. 936 (1981). The judge also erred in finding that this murder was especially heinous, atrocious, or cruel. E.g., Maggard v. State; Lewis v. State, 377 So.2d 640 (Fla.

1979); Cooper v. State, 336 So.2d 1133 (Fla. 1976), cert. denied, 431 U.S. 925 (1977).

Since there were no mitigating circumstances, the two instances of improper double consideration of or giving separate effect to similar statutory aggravating circumstances may be regarded as harmless error. We will simply consolidate the separate statutory factors so as to accord them their proper weight. The double recitation of proven factors does not call the propriety of the sentence into question unless it interferes with the mandated process of weighing the circumstances.

Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919 (1979). Similarly, the erroneous finding that the murder was heinous, atrocious, or cruel may be considered harmless error. Armstrong v. State, 399 So.2d 953 (Fla. 1981).

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The judgments of conviction and the sentence of death are affirmed.

It is so ordered.

ALDERMAN, C.J., ADKINS, BOYD, OVERTON, McDONALD and EHRLICH, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

83-6736

ORIGINAL

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

TERRY MELVIN SIMS,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

Supreme Court, U.S.

FILED

APR 18 1984

Alexander L. Stevas, Clerk

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

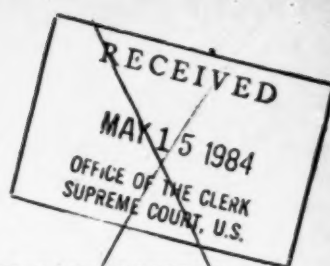
The Petitioner, TERRY MELVIN SIMS, who is now imprisoned in the custody of the Florida Department of Corrections, asks leave to file the accompanying Petition for Writ of Certiorari without pre-payment of costs and to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court. Petitioner has proceeded in forma pauperis at all times in the state courts below. Petitioner has attached hereto his affidavit in substantially the form prescribed by Fed. Rules App. Proc., Form 4, and the Rules of this Court.

Respectfully Submitted,

CRAIG S. BARNARD
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983



TERRY MELVIN SIMS,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, TERRY MELVIN SIMS,, being first duly sworn, depose and say that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes [] No [X]

a. If the answer is "Yes", state the amount of your salary or wages per month, and give name and address of your employer.

Veleta Mear Construction Co. Marietta Fla.

b. If the answer is "No", state the date of last employment and the amount of the salary and wages per month which you received. Veleta Mear Construction Co.

Marietta Fla. \$3.25 hr. 1976

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession or from self employment? Yes []
No [X]

b. Rent payments, interest or dividends? Yes [] No [X]

c. Pensions, annuities or life insurance payments? Yes []
No [X]

d. Gifts or inheritance? Yes [] No ☒

e. Any other sources? Yes [] No ☒

If the answer to any of the above is "yes", describe each source of money and state the amount received from each during the past twelve months. _____

3. Do you own cash, or do you have money in a checking or saving account? Yes [] No ☒ (Include any funds in prison accounts)

If answer is "yes", state the total value of the items owned. \$60⁰⁰ as of April 26-1984

4. Do you own any real estate, stocks, bonds, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes [] No ☒

If the answer is "yes" describe the property and state its approximate value. _____

5. List the persons who are dependent upon your support, state your relationship to those persons and indicate how much you contribute toward their support. None

I understand that a false statement to any questions in this affidavit will subject me to penalties for perjury.

"I declare under penalty of perjury that the foregoing is true and correct."

Terry M. Sims

Signature of Petitioner

STATE OF FLORIDA)

COUNTY OF BRADFORD)

TERRY MELVIN SIMS, being first duly sworn under oath,
presents that he has read and subscribed to the above and states
that the information therein is true and correct.

Terry M. Sims
Signature of Petitioner

SUBSCRIBED and SWORN to before me this 1 day of May, 1984.

Bennie Hamming
NOTARY PUBLIC

My Commission Expires:

W.C. 2

ORIGINAL

Supreme Court, U.S.
FILED
MAY 21 1984
ALEXANDER L. STEVAS
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
CASE NO. 83-6736

TERRY MELVIN SIMS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONSE TO
PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

JIM SMITH
ATTORNEY GENERAL

RICHARD B. MARTELL
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-2005

COUNSEL FOR RESPONDENT

QUESTION PRESENTED

WHETHER THIS COURT SHOULD GRANT CERTIORARI
TO REVIEW AN EVIDENTIARY RULING OF THE STATE
TRIAL COURT REGARDING THE SCOPE OF CROSS-
EXAMINATION WHEREIN PETITIONER HAS NEVER
DEMONSTRATED ANY PREJUDICE THEREBY AND WHERE
THE FLORIDA SUPREME COURT CORRECTLY RESOLVED
THIS ISSUE IN ACCORDANCE WITH THIS COURT'S
APPLICABLE PRECEDENTS.

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IN THE
SUPREME COURT OF THE UNITED STATES
CASE NO. 83-6736

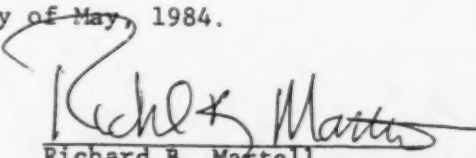
TERRY MELVIN SIMS,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

CERTIFICATE OF SERVICE

I RICHARD B. MARTELL, do hereby certify that I am a member of the Bar of the Supreme Court of the United States, and that I have served a copy of the Response to Petition for Writ of Certiorari to the Supreme Court of Florida, by depositing same in the United States mail, first class postage prepaid, as follows:

CRAIG S. BARNARD
Chief Assistant Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401

All parties required to be served have been served on this 18th day of May, 1984.


Richard B. Martell
Assistant Attorney General
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-2005

AUTHORITIES CITED

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I.

OPINION BELOW

The Florida Supreme Court's opinion in this cause was reported as Sims v. State, 444 So.2d 922 (Fla. 1983), and a copy of such is included in Respondent's appendix (See Appendix, part A).

II.

JURISDICTION

Review is sought pursuant to 28 U.S.C. §1257(3).

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In his pleading Petitioner contends that this case involves the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as §921.141 Fla. Stat. (1977), Florida's capital sentencing statute. Inasmuch as Petitioner has raised no issue relating to his sentence of death in the instant petition, Respondent is unable to find the Eighth Amendment or §921.141 applicable. For reasons set out more fully below, Respondent also contends that Art.I §16 Fla. Const. and §90.612 Fla. Stat. (1977) are involved in this case. Art.I §16 is that provision of Florida's Constitution detailing the rights of an accused in a criminal proceeding; §90.612 is a legislative enactment of that portion of the Evidence Code involving, inter alia, cross-examination. Copies of these two provisions are included in Respondent's appendix (See Appendix, part B).

IV.

STATEMENT OF THE CASE

In his pleading, Petitioner has discussed in detail the evidence presented by the State and defense, in an attempt to put the evidentiary issues complained of in context. Respondent agrees that such task is necessary, but, no doubt due to the nature of the adversary process, disagrees with the emphasis given to or omitted from certain facts in Petitioner's recitation.

Accordingly, Respondent briefly restates that evidence below which it views as relevant to this Court's understanding of the issue presented.

While it is true that Curtis Baldree, a former co-defendant of Petitioner, whose cross-examination is the subject of this proceeding, can be described as a chief or key witness for the state, it must be noted that it was not Baldree's testimony alone which linked Petitioner to the shooting of George Pfiel. Baldree, as well as another co-defendant, James Halsell, testified as to the preparations made for the robbery which occurred, as well as the aftermath thereof, wherein Petitioner, wounded, acknowledged having shot a policeman (R310-322;332;436-446). Three independent witnesses identified Petitioner as one of the robbers of the pharmacy and one described him as the participant who herded many of the customers to the back of the store as the incident was progressing (R404;405;482-7;504;505). Witness Guggenheim testified the Petitioner had shot the deputy as the latter had tried to enter the store (R456). From the testimony of this witness, as well as that of Judith Thompson, it is clear the Petitioner fired the first shot (R496,472). Thus, despite the importance of Baldree's testimony, it is clear that the jury had other testimony upon which to rely in deciding upon Petitioner's guilt or innocence.

As Petitioner has also noted, an acquaintance of his, Bonnie McCumbers, testified at trial that he [Petitioner] had been in Lake City at the time of the incident (R598). It was, of course, up to the jury again to determine the weight to be accorded this testimony, just as it was up to them to consider many of the other matters cited by Petitioner, i.e. the drug use of Petitioner's co-defendants, some witnesses failure to identify Petitioner from photo lineups as opposed to at trial etc.

V. HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Respondent contends, inter alia, that no federal question is involved in this case and that Petitioner's claims as to cross-examination were resolved by the Florida Courts in terms of state, as opposed to federal, law. For the sake of convenience, however, Respondent details the manner in which the cross-examination issue was raised and decided below.

In order to preserve an issue for appellate review in Florida, a defendant must enter a contemporaneous and specific objection at the time a putative error is committed. See e.g. Castor v. State, 365 So.2d 701 (Fla.1978). The record in this case indicates that Petitioner imposed no objection to any of the court's rulings or statements during the cross-examination of witness Baldree. The only matter which could pass for an objection occurred shortly after all examination of the witness had ended and was made at a bench conference. At such time, one of Petitioner's attorneys stated that he wished to take issue with the court for having allegedly cut short the cross-examination of Baldree, as that witness's character and knowledge were relevant to the case (R468). It should be noted that Petitioner's counsel never stated those matters which he was allegedly prevented from raising. (See Appendix, part C, transcript of cross-examination (R446-470)).

In his appellate briefs to the Florida Supreme Court, Petitioner raised a broad-based point on appeal regarding the alleged restriction of cross-examination of witness Baldree. Petitioner argued then, as he does now, that cross-examination was not only curtailed by restrained by the trial court, the latter occurring whenever the trial court admonished defense counsel to "move along". Petitioner similarly identified at least five "examples" of restriction and further contended that the judge's very action in directing counsel to move along constituted prejudicial or reversible

error. It was in such appellate pleadings that Petitioner first identified the Sixth Amendment to the United States Constitution as having been violated at his trial (See Appendix, part D, excerpts of Initial and Reply briefs filed in appeal).

In its Answer brief Respondent in this case, the State of Florida, contested the preservation for review of any and all of Petitioner's arguments in relation to cross-examination; additionally, to the extent that the merits of any claim were addressed, the State relied solely upon Florida law (See Appendix, part E, excerpt of Answer brief filed in appeal). When the Florida Supreme Court resolved this issue in its decision in this case, a very narrow construction was utilized. The court described Petitioner's argument as constituting an assertion that his Sixth Amendment right to cross-examine a witness had been denied when the trial court curtailed defense examination of witness Baldree; the court noted that Petitioner relied upon one of its own prior decisions, Coxwell v. State, 361 So.2d 148 (Fla. 1978). The court examined the question only in reference to the trial court's sustaining of a state objection to defense questioning regarding an individual whom Petitioner allegedly resembled; this ruling of the trial court is identified as Petitioner's fourth example of the alleged restriction of cross-examination (See Petition at 14-15).

The Florida Supreme Court found that the ruling at issue did not constitute a curtailment of cross-examination requiring reversal under Coxwell. It was noted that the defense had been allowed extensive cross-examination of the witness and that the State's objection had only come after the defense questions had gone beyond the scope of Baldree's testimony on direct. The court expressly noted that the defense had not asked for an opportunity to make a proffer to show the relevance of "the information which it was seeking

to bring out", the court then found no error in the judge's ruling. (See Appendix, part A, copy of decision of Florida Supreme Court).

It is, thus, clear that the Florida Supreme Court examined Petitioner's issue on appeal only in reference to the correctness of the evidentiary ruling made. The Florida Supreme Court did not address the merits of any claim that cross-examination in toto had been curtailed or that the judge's comments in and of themselves had constituted prejudicial error. Further, the court's noting of Petitioner's failure to proffer would seem to indicate that, even as to the one ruling reviewed, complete preservation of the claim of error was not recognized. In short, Respondent disputes the contention in the petition to the effect that the Florida Supreme Court clearly resolved this issue on the merits (Petition at 2). Respondent also contends that to the extent that any issue was discussed on the merits, the matter was resolved on the basis of state, as opposed to federal, law; this argument will be more fully briefed below.

VI. REASONS FOR NOT GRANTING THE WRIT

Petitioner has urged this Court to grant certiorari to review an alleged curtailment and restriction of cross-examination in the lower court, and has further presented five specific questions regarding cross-examination which he asserts this case presents the perfect vehicle to resolve. Respondent disagrees. Whereas this Court has, in the past, granted certiorari where it has been felt that in a state proceeding a defendant's right to cross-examination has been impermissibly constrained, see e.g. Pointer v. Texas, 380 U.S. 400 (1965), Douglas v. Alabama, 380 U.S. 415 (1965), Smith v. Illinois, 390 U.S. 129 (1968), Davis v. Alaska, 415 U.S. 308 (1974), this case has nothing in common with such precedents. The instant case does not represent one in which the trial court declared a complete field of

inquiry off limits, as occurred in Smith and Davis, nor does it represent one in which the defense was denied all opportunity for meaningful confrontation, as in Douglas and Pointer. Rather, this case is one of many in which a state trial court exercised its discretion in passing upon an objection to one of the questions raised during cross-examination; Florida, as well as many federal courts, recognizes the broad discretion a trial judge enjoys as to the scope of permissible cross-examination. Petitioner has failed to make his case on both procedural and substantive grounds.

Before turning to the particulars of such, however, it is instructive to examine just what did, and did not, occur at Petitioner's trial. Petitioner has alleged that the trial judge not only restricted cross-examination on repeated occasions, but also curtailed it in toto by cutting off defense counsel. Petitioner has offered five discrete examples of "restriction" and urges this Court to grant certiorari in order to review a number of issues related to cross-examination, including whether or not the trial judge in this specific case was correct in regarding portions of defense counsel's cross-examination as repetitive. Respondent respectively submits that the latter question is not of constitutional moment. Further, the record in this case is clear that in every one of the five "examples" of "restrictions", Petitioner was deprived of nothing through the actions of the trial judge. Witness Baldree answered Petitioner's questions regarding his prior discharge of a firearm during an argument with his girlfriend (R456), co-defendant Halsell's purchase of nail polish for use during the robbery (R460), the date upon which he took Petitioner to Dr. Dunbar (R463) and his knowledge of one Terry Wayne Gale (R465-6); all questions related to collateral matters and Petitioner has never demonstrated that he was denied further interrogation on any one of these subjects. Similarly, although the terms of Baldree's deal

with the State were of greater importance, Petitioner never demonstrated that he wished to pursue the matter further, after the trial judge restated the plea agreement (R465-6). The Florida Supreme Court was correct in recognizing that Petitioner was afforded extensive cross-examination of witness Baldree, and whereas Petitioner has identified some important constitutional concepts in his petition, he has failed to demonstrate that he suffered the violation of any constitutional right during his state trial.

In Street v. New York, 394 U.S. 576 (1969) this Court held that when the highest court of a state has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party can demonstrate otherwise. See also Cardinale v. Louisiana, 394 U.S. 437 (1969). As has been noted, Petitioner's only objection at trial was after the examination of witness Baldree had concluded and such objection was highly generalized; the Florida Supreme Court did not address at least 80% of Petitioner's argument in relation to cross-examination, and as to that portion addressed, the court noted that Petitioner had never proffered the evidence which he felt he had been prevented from bringing out. Again as noted earlier, Florida requires a contemporaneous specific objection in order to preserve a point for appellate review and additionally Florida courts have required that one seeking the admission of testimony must demonstrate its relevance. See e.g. Castor v. State, 365 So.2d 701 (Fla. 1978); Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Hitchcock v. State, 413 So.2d 741 (Fla.), cert. denied, ___ U.S. ___, 103 S.Ct. 274 (1982); Wainwright v. Sykes, 433 U.S. 72 (1977). Respondent contends that the Florida Supreme Court's failure to address the bulk of Petitioner's argument as to cross-examination was a recognition that such point had not been properly presented and that, pursuant to Street, this Court should similarly decline to reach the issue.

Furthermore, even if any claim regarding cross-examination was properly presented below, the extent to which such claim related to the federal constitution is highly debatable. In the context of federal habeas corpus, the court in Chipman v. Mercer, 628 F.2d 528, 531 (9th Cir. 1980) observed that neither the confrontation clause nor the case-by-case application utilized by courts to resolve confrontation questions should be interpreted to permit persons convicted in state proceedings to use putative Sixth and Fourteenth Amendment claims as vehicles for obtaining federal review of evidentiary questions properly left to the state courts. Respondent contends that the above language is applicable to this situation, and that not every cry of "restriction of cross-examination" is synonymous with an allegation that a federal constitutional right has been violated. As noted earlier, Florida's Constitution confers the right of confrontation upon all accused. See Art.I, §16 Fla. Const. Whereas the Florida Supreme Court in its decision did note that Petitioner was alleging violation of his Sixth Amendment rights, and did not expressly cite to Florida's Constitution, Respondent still contends that an independent state ground exists to uphold Petitioner's conviction; similarly, it would seem that the court's finding that the questioning at issue was beyond the scope of direct examination was, while not expressly stated, premised upon §90.612(2) Fla. Stat. (1977). Accordingly, Respondent contends that Petitioner has failed to demonstrate that a federal claim was left unredressed or was addressed incorrectly by the Florida Supreme Court.

To the extent that the merits of Petitioner's claim are at all relevant, he has further failed to demonstrate that the trial judge abused his discretion in any manner relating to cross-examination or that, should such have occurred, he [Petitioner] was prejudiced to any degree thereby. In prior capital cases, among others, the Florida Supreme

Court has been stringent in protecting the defense's right to cross-examination, reversing when necessary as in Coxwell, but affirming when it is clear that the evidentiary ruling complained of was one merely within the discretion of the court and where at most only collateral or irrelevant matters were excluded. See Sireci v. State, 399 So.2d 964 (Fla. 1981), cert. denied 456 U.S. 984 (1982); Maggard v. State, 399 So.2d 973 (Fla.), cert. denied 454 U.S. 1059 (1981); Steinhorst, supra; Washington v. State, 432 So.2d 44 (Fla. 1983); Justus v. State, 438 So.2d 358 (Fla. 1983); Jones v. State, 440 So.2d 570 (Fla. 1983); Slaughter v. State, 301 So.2d 762 (Fla. 1974), cert. denied 420 U.S. 1005 (1975). Significantly, in two of the above cases, Jones and Steinhorst, the court noted that the defendant in each case, while alleging that his cross-examination of a state witness had been curtailed, had failed to call the witness himself as a means of "reaching" the desired testimony, which was outside the scope of direct. This represents yet another road untaken by Petitioner in this case, in relation to his cross-examination of witness Baldree as to the alleged look-alike, Terry Wayne Gale.

It is equally significant that the Florida standard of review regarding cross-examination seems compatible with that utilized by federal courts. Thus, circuit courts of appeal throughout the country, recognizing that the scope and extent of cross-examination is within the discretion of the trial court, have held that limitation of cross-examination will not result in reversal unless it is clear that a defendant has been denied his right to confrontation thereby. See United States v. Wesson, 478 F.2d 1180 (7th Cir. 1973); United States v. Haro, 573 F.2d 661 (10th Cir.), cert. denied 439 U.S. 851 (1978); United States v. Weiner, 578 F.2d 757 (9th Cir.), cert. denied 439 U.S. 981 (1978); United States v. Cleveland, 590 F.2d 24 (1st Cir. 1978); Cheek v. Bates, 615 F.2d 559 (1st Cir.), cert. denied 446 U.S. 944 (1980); United States v. Haimowitz, 706 F.2d 1549 (11th Cir. 1983),

cert. denied, ___ U.S. ___, 104 S.Ct. 974 (1984). In observations applicable sub judice, the court in Weiner noted that a trial judge has a duty to control cross-examination and to prevent it from unduly burdening the record with cumulative or irrelevant matter; in Cheek v. Bates the court reversed the granting of a petition for writ of habeas corpus, finding that at trial the defense had never made clear the purpose of their proposed questioning, and that consequently the trial court's ruling had not in fact constituted a curtailment of cross-examination. In light of such precedent, it is clear that the actions of the trial judge in this case are not as unprecedented or iniquitous as Petitioner alleges.

Additionally, as at least three federal courts have recognized, not every restriction in cross-examination results in reversal of a conviction. The Fifth, Seventh and District of Columbia Circuit Courts of Appeal have all found Davis v. Alaska to be no bar to the finding of harmless error in the context of alleged restriction or curtailment of cross-examination. See United States v. Gambler, 662 F.2d 834 (D.C. Cir. 1981); United States ex. rel. Scarpelli v. George, 687 F.2d 1012 (7th Cir. 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 817 (1983); Carrillo v. Perkins, 723 F.2d 1165 (5th Cir. 1984). Thus, in Gambler, the court found that the trial court should have allowed the defense to question a prosecution witness as to the existence of certain civil suits which could exemplify bias; such restriction, however, was found to be harmless in light of the rest of the evidence. A similar result ensued in Carillo, where it was recognized that the trial court had impermissibly prevented the defendant from impeaching a critical state witness. In Scarpelli the appellate court reversed the district court's granting of a petition for writ of habeas corpus, finding that any restriction in cross-examination had been harmless. The above cases are all significant, as Petitioner has asserted that this case presents the proper vehicle for this Court to

determine whether or not a defendant alleging restriction of cross-examination need also show resultant prejudice. Assuming that the Florida Supreme Court considered Petitioner's claim in terms of harmless error, such action would not seem as unprecedented as Petitioner apparently believes.

In conclusion, this Court's exercise or its discretionary jurisdiction would be unwarranted in this case. In addition to Petitioner's failure to demonstrate that he preserved and presented a federal question through all phases of the proceedings, Petitioner has not shown that he is doing more than challenging a discretionary evidentiary ruling of a state trial court. Had Petitioner ever sought to apprise the trial judge of his theory of relevance as to any of his allegedly curtailed lines of questioning, it is more than likely that this appellate point would never have come to exist. As it is, Petitioner asks this Court to presume the violation of his Sixth Amendment right to confrontation and cross-examination based on a record bereft of any showing of prejudice. The Florida Supreme Court thoroughly reviewed Petitioner's conviction and its resolution of this point on appeal regarding cross-examination is in accord with its own precedents, as well as those of this Court and other federal courts. Furthermore, despite Baldree's importance to the case, there was other sufficient evidence from which the jury could find Petitioner guilty of the charges. All of the above factors render the instant case an unsuitable one for certiorari.

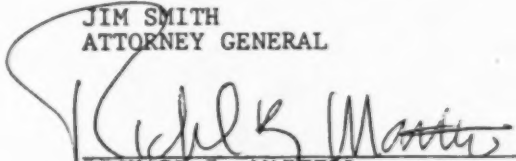
VII.

CONCLUSION

For the foregoing reasons, the instant petition
for writ of certiorari should be denied.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
CASE NO. 83-6736

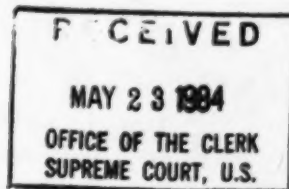
TERRY MELVIN SIMS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

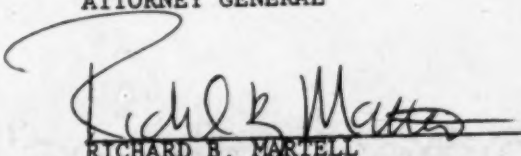


NOTICE OF FILING
SUPPLEMENTAL APPENDIX

COME NOW Respondent, State of Florida, and
files with this Court the following item which was
inadvertently omitted from Part B of the Appendix
accompanying its Response to Petition for Writ of
Certiorari filed on or about May 18, 1984.

Respectfully submitted,

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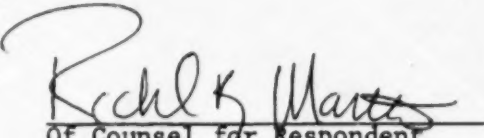
COUNSEL FOR RESPONDENT

§ 16. Rights of accused

In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation against him, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by impartial jury in the county where the crime was committed. If the county is not known, the indictment or information may charge venue in two or more counties conjunctively and proof that the crime was committed in that area shall be sufficient; but before pleading the accused may elect in which of those counties he will be tried. Venue for prosecution of crimes committed beyond the boundaries of the state shall be fixed by law.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the enclosed has been
furnished by mail to CRAIG S. BARNARD, Chief Assistant
Public Defender, 15th Judicial Circuit of Florida,
224 Datura Street/13th Floor, West Palm Beach, Florida 33401,
on this 21st day of May, 1984



Of Counsel for Respondent
Richard B. Martell

ORIGINAL
IN THE

SUPREME COURT OF THE UNITED STATES

CASE NO. 83-6736

Supreme Court, U.S.
FILED

MAY 21 1984

ALEXANDER L. STEVENS
CLERK

TERRY MELVIN SIMS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONSE TO
PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

APPENDIX

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PART A

Opinion of the Florida Supreme Court in Sims v. State,
444 So.2d 922 (Fla. 1983).

PART B

Art.I §16 Fla. Const.

§90.612 Fla. Stat. (1977)

PART C

Excerpt of Petitioner's trial in State Court, covering
cross-examination of witness Baldree. (R446-470)

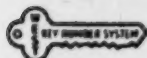
PART D

Excerpts of Petitioner's Initial and Reply briefs,
filed in appeal to Florida Supreme Court.

PART E

Excerpt of Respondent's Answer brief filed in appeal
to Florida Supreme Court.

PART A



Terry Melvin SIMS, Appellant,

v.

STATE of Florida, Appellee.

No. 57510.

Supreme Court of Florida.

Nov. 3, 1983.

Rehearing Denied Jan. 19, 1984.

Defendant was convicted in the Circuit Court, Seminole County, Tom Waddell, Jr., J., of first-degree murder and robbery, and he appealed. The Supreme Court, Boyd, J., held that: (1) trial court's sustaining of State's objection to certain questioning of a State's witness during cross-examination by defense was not a curtailment of cross-examination requiring reversal; (2) trial judge did not abuse his discretion in denying defendant's request for an evidentiary hearing on whether the exclusion of potential jurors unalterably opposed to the death penalty resulted in a jury predisposed toward conviction; (3) trial court did not err in refusing to allow further questioning of a juror in a posttrial hearing about whether the jurors had considered defendant's not testifying in reaching their verdict; (4) no prejudice arose from denial of defendant's motion to require the State to elect one of two counts submitted to jury; and (5) despite trial court's erroneous findings as to some aggravating circumstances, sufficient aggravating circumstances remained to support sentence of death.

Affirmed.

1. Criminal Law \S 1036.2

Trial court's ruling sustaining the State's objection to defense counsel's questioning of a State's witness was not a curtailment of cross-examination requiring reversal where the defense was allowed extensive cross-examination of the witness and the State's objection and the court's ruling thereon came only after the defense went into matters beyond the scope of the witness' direct testimony and the defense did not ask for an opportunity to make a proffer to show the relevance of the information it was seeking to bring out.

2. Criminal Law \S 1169.11

Vague reference by a defense witness to the use of defendant's "mug shot" in a photographic display did not specifically refer to a prior conviction and was not so prejudicial as to require a new trial.

3. Witnesses \S 414(1)

In prosecution for first-degree murder and robbery, trial judge did not err in excluding from evidence documents corroborative of defense witness' testimony, in that the documents were superfluous to the witness' testimony and were not relevant to a material issue of fact.

4. Criminal Law \S 1030(1)

Defendant failed to preserve issue for appeal by failing to object at trial.

5. Jury \S 23(2.1)

In prosecution for first-degree murder and robbery, trial judge did not abuse its discretion by not granting defendant's request for an evidentiary hearing on whether the exclusion of potential jurors unalterably opposed to the death penalty results in a jury predisposed toward conviction.

6. Criminal Law \S 848

A juror's testimony is relevant only if it concerns matters that do not essentially inhere in the verdict itself.

7. Criminal Law \S 857(3)

A jury's consideration of a defendant's failure to testify is not the same as considering evidence outside the record, but

rather is an example of its misunderstanding or not following the instructions of the court and such misunderstanding is a matter which essentially inheres in the verdict itself.

8. Criminal Law § 868

Trial court did not err in refusing to allow further questioning of juror in a post-trial hearing about whether the jurors had considered defendant's not testifying in reaching their verdict, in that the record showed that the jury was properly instructed that the State had the burden of proving defendant's guilt and that defendant was not required to respond.

9. Criminal Law § 1166(1)

In prosecution for first-degree murder and robbery, no prejudice arose from the trial court's denial of defendant's motion to require the State to elect between counts of felony-murder of the victim based upon the robbery of one person and a second count charging felony-murder of the victim based on the robbery of a second person, in that the court in effect consolidated the two verdicts by entering judgment of conviction for a single offense of first-degree murder.

10. Criminal Law § 1177

In capital prosecution in which there were no mitigating circumstances found at the sentencing stage, two instances of the trial court giving improper double consideration of or giving separate effect to similar statutory aggravating circumstances was harmless error. West's F.S.A. § 921.141(5)(b-h).

11. Criminal Law § 1177

In capital prosecution in which there were no mitigating circumstances, the erroneous finding that the murder was heinous, atrocious, or cruel was harmless error, in light of remaining aggravating circumstances. West's F.S.A. § 921.141(5)(b-h).

12. Criminal Law § 1206.1(4)

In capital prosecutions in which there are some aggravating and no mitigating circumstances, death is presumed to be the appropriate punishment. West's F.S.A. § 921.141(5)(b-h).

Richard L. Jorandby, Public Defender and Craig S. Barnard, Chief Asst. Public Defender, Fifteenth Judicial Circuit, West Palm Beach, for appellant.

Jim Smith, Atty. Gen., and James Dickson Crock, Mark C. Menser and Richard B. Martell, Asst. Attys. Gen., Daytona Beach, for appellee.

BOYD, J.

This case is an appeal from judgments of conviction for first-degree murder and robbery and a sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

Terry Melvin Sims was convicted for the first-degree murder of George Pfeil, an off-duty deputy sheriff who entered a pharmacy while it was being robbed by Sims and three other men. Two of these other participants, Curtis Baldree and B.B. Halsell, were the state's chief witnesses. They testified that Sims and Baldree armed themselves with pistols and entered the pharmacy, while Halsell and the fourth participant, Gene Robinson, waited in a car a short distance away. Baldree said that he went to the back of the store to rob the pharmacist while Sims stayed at the front of the store watching the door. Sims ordered the customers and employees to the back of the store and into the bathroom. When Pfeil came into the store he and Sims exchanged gunfire. Pfeil was shot twice and Sims was wounded in the hip. Sims and Baldree escaped the scene and later joined their accomplices. The four men then departed the area.

This account of the robbery and the shooting was confirmed by pharmacist Robert Duncan, Duncan's wife and daughter both of whom worked at the store, and two customers who identified appellant. One of the customers, William Guggenheim, testified that he tried to leave the store when he saw a man pointing a gun at the pharmacist. He was stopped by Sims who took his wallet. Guggenheim said he then saw Sims shoot a man who was entering through the front door.

The main theory of defense was mistaken identity. The defense attempted to discredit Baldree and Halsell on the basis of their bad character, drug addiction, criminal records, and the plea arrangements between them and the state. The defense attacked the identification testimony of one of the customers as the product of a suggestive photographic line-up and questioned the testimony of Guggenheim on the basis of his earlier failure to choose appellant from a photographic line-up. The defense then presented evidence of appellant's resemblance to another individual said to be a frequent criminal associate of Baldree and Halsell.

The jury returned verdicts of guilty of first-degree murder and robbery. At the sentencing phase, the state presented a certified copy of a 1971 Orange County conviction for assault with intent to rob. The defense presented witnesses who testified to appellant's good character and difficult background circumstances. The jury recommended death. Finding several aggravating circumstances and no mitigating circumstances, the trial judge adopted this recommendation.

[1] Appellant's first point on appeal is that he was denied his sixth amendment right to cross-examine a witness when the trial court curtailed defense counsel's cross-examination of Baldree. He relies on *Corwell v. State*, 361 So.2d 148 (Fla.1978). The asserted error occurred when defense counsel began questioning Baldree about the individual whom appellant was said to resemble. We do not find that the court's ruling was a curtailment of cross-examination requiring reversal under *Corwell v. State*. Here the defense was allowed extensive cross-examination of the witness and the state's objection and the court's ruling thereon came only after the defense went into matters beyond the scope of Baldree's direct testimony. The defense did not ask for an opportunity to make a proffer to show the relevance of the information it was seeking to bring out. We find no error in the judge's ruling.

[2] Next appellant argues that the trial judge should have granted his motion for mistrial when a witness mentioned using appellant's "mug shot" in a photographic display. Since these words were used by a defense witness and did not specifically refer to a prior conviction, we find that this vague reference to other possible criminal activity was not so prejudicial as to require a new trial. See *Straight v. State*, 397 So.2d 903 (Fla.), cert. denied, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981).

[3] Appellant also claims the trial judge erred in excluding from evidence documents corroborative of a defense witness's testimony. Since the documents were superfluous to the witness's testimony and were not relevant to a material issue of fact, we find this point to be without merit.

[4] Next appellant argues that the prosecutor made several improper comments during his closing argument. Since appellant failed to object at the trial, he has failed to preserve this point for appeal. *State v. Cumbie*, 380 So.2d 1031 (Fla.1980); *Clark v. State*, 363 So.2d 331 (Fla.1978).

[5] Appellant's fifth point on appeal is that the trial judge erred by not granting his request for an evidentiary hearing on whether the exclusion of potential jurors unalterably opposed to the death penalty results in a jury predisposed toward conviction. We have held that a defendant is not entitled to have jurors serve on his jury who are unalterably opposed to the death penalty and that a trial judge may excuse such jurors for cause. *Maggard v. State*, 399 So.2d 973 (Fla.), cert. denied, 454 U.S. 1059, 102 S.Ct. 610, 70 L.Ed.2d 598 (1981); *Riley v. State*, 366 So.2d 19 (Fla.1978). Since we have previously determined as a matter of law that there is no constitutional infirmity with excluding jurors who because of personal beliefs could not render a verdict of guilty in a capital felony case, the trial judge did not abuse his discretion in denying the request for an evidentiary hearing.

[6-8] Next appellant complains that he was prevented from further questioning a

juror in a post-trial hearing about whether the jurors had considered appellant's not testifying in reaching their verdict. The general rule in Florida is that a juror's testimony is relevant only if it concerns matters which do not essentially inhere in the verdict itself. *Russ v. State*, 95 So.2d 594 (Fla.1957); *Parker v. State*, 336 So.2d 426 (Fla. 1st DCA), *appeal dismissed*, 341 So.2d 292 (Fla.1976). A jury's consideration of a defendant's failure to testify is not the same as considering evidence outside the record, but is rather an example of its misunderstanding or not following the instructions of the court. Such misunderstanding is a matter which essentially inheres in the verdict itself. *Russ v. State*; *Parker v. State*. We find from the record that the jury was properly instructed that the state has the burden of proving the defendant's guilt and that the defendant is not required to respond. Therefore the court did not err in refusing to allow further questioning of the juror.

[9] Appellant's final argument concerning the guilt phase of the trial is that the trial judge erred in allowing the jury to return verdicts on multiple and inconsistent counts. In one count appellant was charged with premeditated murder or felony-murder of Pfeil based upon the robbery of Duncan. In a second count he was charged with premeditated murder or felony-murder of Pfeil based on the robbery of Guggenheim. Appellant filed a motion to require the state to elect one or the other count on the ground that since there was only one killing he could be found guilty at the very most of only one murder. The trial court denied the motion, finding there was no necessary inconsistency between the two verdicts. We agree with this ruling. See *Reed v. State*, 94 Fla. 32, 113 So. 630 (1927). In essence, the crime of murder was charged by alternative counts of the indictment. The court in effect consolidated the two verdicts by entering judgment of conviction for a single offense of first-degree murder. No prejudice arose from the denial of the motion to elect.

We now consider whether the trial judge properly imposed a sentence of death. As was stated above, the jury recommended the capital sentence. As aggravating circumstances, the trial judge found that appellant had previously been convicted of a felony involving the use or threat of violence, citing a previous conviction for assault with intent to rob and a previous conviction for robbery, section 921.141(5)(b), Florida Statutes (1977); that appellant created a great risk of death to many persons, section 921.141(5)(c); that the capital felony was committed in the course of or in the attempt to commit or in flight after committing a robbery, section 921.141(5)(d); that the murder of the uniformed deputy sheriff was committed for the purpose of avoiding arrest, section 921.141(5)(e); that the murder was motivated by pecuniary gain, section 921.141(5)(f); that the murder was committed to disrupt or hinder the enforcement of the law, section 921.141(5)(g); and that the murder was especially heinous, atrocious, or cruel, section 921.141(5)(h). Finding no statutory mitigating circumstances, the trial judge found that the aggravating circumstances outweighed any mitigating considerations.

Appellant points out several errors in the judge's findings. One is that the judge should not have given separate consideration to circumstances (d), commission during a robbery, and (f), commission for pecuniary gain. *Provence v. State*, 337 So.2d 783 (Fla.1976), *cert. denied*, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). Nor should the judge have considered as separate aggravating circumstances (e), avoiding arrest, and (g), hindering law enforcement. *Clark v. State*, 379 So.2d 97 (Fla. 1979), *cert. denied*, 450 U.S. 936, 101 S.Ct. 1402, 67 L.Ed.2d 371 (1981). The judge also erred in finding that this murder was especially heinous, atrocious, or cruel. *E.g., Maggard v. State*; *Lewis v. State*, 377 So.2d 640 (Fla.1979); *Cocper v. State*, 336 So.2d 1133 (Fla.1976), *cert. denied*, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977).

[10, 11] Since there were no mitigating circumstances, the two instances of improper double consideration of or giving separate effect to similar statutory aggravating circumstances may be regarded as harmless error. We will simply consolidate the separate statutory factors so as to accord them their proper weight. The double recitation of proven factors does not call the propriety of the sentence into question unless it interferes with the mandated process of weighing the circumstances. *Hargrave v. State*, 366 So.2d 1 (Fla.1978), cert. denied, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979). Similarly, the erroneous finding that the murder was heinous, atrocious, or cruel may be considered harmless error. *Armstrong v. State*, 399 So.2d 953 (Fla.1981).

[12] Despite these errors, therefore, we find that death is still the appropriate penalty. It was properly determined that the capital felony was committed in the course of a robbery, that it was committed for the purpose of avoiding arrest, and that appellant had previously been convicted of life-threatening crimes. Where there are some aggravating and no mitigating circumstances, death is presumed to be the appropriate punishment. *State v. Dixon*, 283 So.2d 1 (Fla.1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Therefore, despite the judge's erroneous consideration of some of the aggravating circumstances, there remain several other aggravating circumstances properly found which support the sentence of death.

The judgments of conviction and the sentence of death are affirmed.

It is so ordered.

ALDERMAN, C.J., and ADKINS, BOYD, OVERTON, McDONALD and EHRLICH, JJ., concur.



**TAMPA-HILLSBOROUGH COUNTY
EXPRESSWAY AUTHORITY,**
Petitioner,

v.

**K.E. MORRIS ALIGNMENT SERVICE,
INC.,** Respondent.

No. 62281.

Supreme Court of Florida.

Nov. 10, 1983.

Rehearing Denied Feb. 22, 1984.

Appeal was taken from judgment of the Circuit Court for Hillsborough County, James A. Lenfestey, J., denying business damages to landowner in connection with partial taking. The District Court of Appeal, 414 So.2d 299, reversed, and the condemnor appealed. The Supreme Court, Boyd, J., held that as a prerequisite to an award of business damages under statute, business must have been in operation at the location for which business damages are claimed for more than five years.

Decision of District Court of Appeal quashed; remanded with instructions.

Adkins, J., dissented.

1. Eminent Domain ¶122

Although power of eminent domain is inherent feature of sovereign authority of state, Constitution limits this power by requiring that full compensation be paid to owner for property taken. West's F.S.A. Const. Art. 10, § 6(a).

2. Eminent Domain ¶90, 107

The payment of compensation for intangible losses and incidental or consequential damages in connection with exercise of eminent domain power, including business damages claimed as a result of taking of property adjacent to business, is not required by State Constitution, but is granted or withheld simply as a matter of legislative grace. West's F.S.A. Const. Art. 10, § 6(a).

PART B

90.612 Mode and order of interrogation and presentation

(1) The judge shall exercise reasonable control over the mode and order of the interrogation of witnesses and the presentation of evidence, so as to:

(a) Facilitate, through effective interrogation and presentation, the discovery of the truth.

(b) Avoid needless consumption of time.

(c) Protect witnesses from harassment or undue embarrassment.

(2) Cross-examination of a witness is limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in its discretion, permit inquiry into additional matters.

(3) Except as provided by rule of court or when the interests of justice otherwise require:

(a) A party may not ask a witness a leading question on direct or redirect examination.

(b) A party may ask a witness a leading question on cross-examination or recross-examination.

Law Revision Council Note—1976

Subsection (1) This subsection restates the common law power and obligation of the judge to exercise reasonable control over the mode and order of interrogating witnesses and the presentation of witnesses. Existing law, in recognizing that the primary object of the examination of witnesses is to make known the truth, *Coogler v. Rhodes*, 38 Fla. 240, 21 So. 109, 111 (1897), allows the trial court to exercise its discretion to "regulate the order of the introduction of evidence," *Wilson v. Jernigan*, 57 Fla. 277, 49 So. 44, 47 (Fla.1909); to exclude repetitious or wasteful questions, *Eatman v. State*, 48 Fla. 21, 37 So. 576 (Fla.1904); and to maintain the dignity of the courtroom, which includes the protection of witnesses under examination, *Baisden v. State*, 203 So.2d 194 (Fla. 4th Dist. 1967), from harassment or embarrassment. *Loftin v. Morgenstern*, 60 So.2d 732 (Fla. 1952).

Subsection (2) This subsection limits cross-examination to the scope of direct and is justified by the promotion of the orderly presentation of the examiner's case. The existing Florida law is in accord with this subsection.

In *Padgett v. State*, 64 Fla. 389, 397, 59 So. 946, 949 (1912), the court recognizes:

the well established rule that a party has no right to cross-examine a witness except as to facts and circumstances connected

PART C

1 Q And your term will be complete when you serve two
2 years in the County Jail; is that correct?

3 A Yes, sir.

4 Q What was your part of the deal, Curtis?

5 A That I was to tell the truth of everybody that was
6 involved in the crime.

7 Q You were the first one apprehended, weren't you?

8 A Yes, sir.

9 Q Have you told the truth?

10 MR. RABINOWITZ: Objection.

11 MR. HEPPERMAN: I object to that, Your Honor.

12 THE COURT: I'll sustain the objection.

13 Does that conclude direct?

14 MR. DICK: Yes, sir, it does.

15 THE COURT: You may inquire.

16 CROSS EXAMINATION

17 BY MR. RABINOWITZ:

18 Q Mr. Baldree, what is your educational background?

19 A I have a high school diploma which I received in
20 prison.

21 Q And are you presently a drug addict, sir?

22 A I would say no.

23 Q Okay. Were you addicted to narcotics in November
24 and December of 1977?

25 A I was not addicted. I was an occasional user.

1 Q You were an occasional user?

2 A (Witness nods.)

3 Q What is an occasional user, Mr. Baldree?

4 A An occasional user is one who uses on special occasions but is not dependent on the drug itself.

5 Q Okay. How often would you take drugs in the month
6 of November and December, 1977?

7 A I've went three or four weeks at a time without
8 using and I have used two or three shots a week.

9 Q Okay. You weren't taking shots on a daily basis?

10 A No, I wasn't.

11 Q And for how long have you been taking narcotic drugs?

12 A I have been using drugs off and on for twenty years,
13 probably.

14 Q Did these drugs . . . What effect did these drugs
15 have upon your perceptions, sir?

16 A They are merely, they tranquilize you and a pain
17 reliever. They relax you.

18 Q What drugs were you taking during the month of
19 November and December of 1977?

20 A Dilaudid and heroin..

21 Q And did these drugs ever cause you to hallucinate,
22 sir?

23 A No.

24 Q Did these drugs cause you to say and perceive things
25

1 that were unreal?

2 A No, sir.

3 Q In December of 1977, where did you reside, sir?

4 A I was living at the Riviera Apartments on Atlantic
5 Boulevard.

6 Q And who did you reside with?

7 A Joyce Gray.

8 Q And how were you earning your living, sir?

9 A I was selling narcotics.

10 Q Were you living off Joyce Gray as well?

11 A Excuse me, I didn't get that question.

12 Q Were you living off Joyce Gray?

13 A Not exactly, no.

14 Q You're saying here today that the way you earned
15 your money was selling narcotics?

16 A That's right.

17 Q Okay. And in what quantity of narcotic drugs were
18 you dealing, sir?

19 A I had up to seventy-five or eighty pounds of mari-
20 juana.

21 Q And where did you receive this marijuana from?

22 A From Miami.

23 Q Who in Miami, sir?

24 MR. DICK: Objection, Your Honor. Not relevant.

25 THE COURT: If you want the floor, please stand.

MR. DICK: Object. Not relevant.

THE COURT: I believe it goes beyond the scope of direct, as well. Objection sustained.

MR. RABINOWITZ: Thank you.

Q During this time did you have occasion to meet one B. B. Halsell?

A Yes, sir, I did.

Q Now, do you recall giving a statement to the police, specifically a Sgt. Ralph Salerno, and a Lt. A. J. Calangelo on the 2nd day of March, 1978, shortly after your capture, do you recall giving a statement, sir?

A Yes, sir.

Q And you're testifying here today that you earned your living through selling narcotics; is that right?

A Yes, sir.

Q Do you remember Sgt. Salerno asking you the question on March 10th--

MR. DICK: Could we have a page, Your Honor?

MR. RABINOWITZ: Excuse me.

MR. DICK: May we have a page?

MR. RABINOWITZ: Page 10.

MR. DICK: Thank you.

Q Do you recall Sgt. Salerno asking you the question, "Where did you get all your money?" And your response, "I've got a rich old lady."

1 Sgt. Salerno: "You got it from your wife?" Your
2 response, "My wife."

3 Let me ask you, Mr. Baldree, do you recall making
4 that statement?

5 A I recall making the statement.

6 Q Is this, are these your initials on the bottom of
7 this page?

8 A Yes, sir.

9 Q Are you saying here today that you didn't tell the
10 truth to Sgt. Salerno at that time?

11 A I replied to your question that I wasn't living
12 entirely off my wife.

13 Q Where did you get your moeny, from narcotics or
14 from your wife?

15 A From both.

16 Q Okay. Was Mr. Halsell a drug addict during this
17 time, to your knowledge?

18 A Yes, sir, he was.

19 Q Did you and Mr. Halsell have occasion to share each
20 other's narcotics?

21 A Not over twice.

22 Q Not over twice?

23 A Right.

24 Q Do you recall the two times that you and Mr. Halsell
25 only shared your narcotics?

1 A Yes, I can.

2 Q When were those two occasions?

3 A Around the first of November, I went to his motel.
4 and bought a gram of heroin from him.

5 Q And the second time?

6 A The second time that I got any drugs from him was
7 down here. The morning of the robbery. December 29th.

8 Q And the type of drugs that you got from Mr. Halsell
9 on the 29th?

10 A Was heroin.

11 No, December 29th down here was morphine.

12 Q Okay. How much did you have?

13 A We had a half a gram tablet apiece.

14 Q Okay. Now, you and Mr. Halsell were friends during
15 the months of December, 1977, to January, 1978, were you not?

16 A Yes, sir.

17 Q Were you a team, sir? Were you and Mr. Halsell a
18 team actively engaged in robberies?

19 A No, sir.

20 Q Who was Mr. Halsell's girlfriend during this time?

21 A As far as I know, it was Gail Millikan.

22 Q On December 28th, you were living with Joyce Gray,
23 were you not?

24 A Yes, sir.

25 Q And on the 28th you claim that Gene Robinson came

1 over to your home; is that correct?

2 A Yes, sir.

3 Q Okay. Just prior to Mr. Robinson coming over to
4 your home, sir, what did you do?

5 A I had used some drugs.

6 Q Okay. What kind of drugs did you use, sir?

7 A Dilaudid and Seconal.

8 Q And what did you do with the Dilaudid and Seconal?

9 A I injected the dilaudid intravenously and swallowed
10 the Seconal.

11 Q And what effect did they have on you when you
12 injected them into your veins?

13 A The stuff I injected merely relaxed me.

14 Q Did they cause you to hallucinate at any point?

15 A No, sir.

16 Q Okay. Did they make it difficult for you to speak
17 accurately and coherently and walk steadily?

18 A The Seconals that I swallowed made me drunk and
19 sleepy.

20 Q And what about the Dilaudid?

21 A I just stated the Dilaudid relaxed me. The combina-
22 tion of the two made me drunk and sleepy.

23 Q Was Joyce Gray present on the 28th day of December
24 when you were taking these drugs?

25 A Yes, sir.

1 A Yes, sir.

2 Q And were you having an argument that day with her?

3 A Yes, sir.

4 Q And wasn't the substance of that argument that you

5 accused Mrs. Gray of having an affair with a subject by the

6 name of--

7 MR. DICK: Your Honor, I don't understand the rele-

8 vance of it, and I'll object to it.

9 THE COURT: I'll allow counsel to conclude his

10 question and I'll ask the witness not to answer until

11 you have an opportunity to object if you so desire. You

12 may conclude your question, Mr. Rabinowitz.

13 MR. RABINOWITZ: Thank you, Your Honor.

14 Q Isn't it true that the substance of your argument

15 was that you accused Mrs. Gray of having an affair with a man

16 by the name of Gene Robinson?

17 A No, sir.

18 Q That was not the substance of your argument. Okay.

19 At what time did Mr. Robinson come to your house?

20 A Around noon or one o'clock.

21 Q And was Joyce Gray there when Mr. Robinson came?

22 A Yes, sir, she was.

23 Q And did Joyce Gray see Mr. Robinson in the house?

24 A Yes, sir.

25 Q And did you tell Joyce Gray where you were going?

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A I told her I was going to Tampa.

Q You told her that?

A I did.

Q And then you left with Mr. Robinson?

A Yes, sir.

Q And after you had injected these drugs into your veins did you have any more drugs in your house?

A Yes, sir.

Q You are claiming you did have more drugs in your home?

A There was a little left in the house.

Q Do you recall giving a deposition on Friday, December 1st, 1978, at the Seminole County Courthouse, where I was present and Mr. Sims was present, and Mr. Heffernan was present and Mr. Dick was present and Mr. Robinson was present, do you recall that?

A Yes, sir, I do.

Q And do you recall the question--

MR. DICK: Page, please.

MR. RABINOWITZ: I'm sorry. Page 27, Line 2, Your Honor.

Q "Were you holding any at that time as well?"

Answer: "No."

Do you recall that question and that response by you, and then the further question, "No?" And then your

1 answer, "No." And then the question, "Except for your per-
2 sonal use?" And your answer, "I didn't have any." And then
3 the question: "Didn't have any?" Your answer: "No."

4 Question: "Were you tapped out?" Your answer: "I
5 was."

6 Do you recall those questions and those answers?

7 A Yes, sir, I recall those questions.

8 Q Do you recall saying you were tapped out?

9 A As far as hard narcotics, I was tapped out.

10 Q You were tapped out. You didn't have any more?

11 A That's right.

12 Q Okay. As far as the Dilaudid and Seconal that you
13 shot into your vein on the 28th, did you have a valid prescrip-
14 tion for these drugs, sir?

15 A I did have a valid prescription at one time.

16 Q For the drugs that you shot on the 28th?

17 A No, sir.

18 Q Thank you, sir.

19 Did you own any weapon at this time, on the 28th?

20 A There was a weapon at my house.

21 Q Okay. Did you own it?

22 A No, sir.

23 Q Haven't you previously testified, sir, that that
24 gun was given to you as a present by Gene Robinson during
25 Christmas?

1 A I stated that Gene Robinson left the gun there
2 approximately two weeks before the robbery happened down here.
3 I didn't say he had gave it to me or left it for Christmas.

4 THE COURT: Let's move on, Mr. Rabinowitz.

5 MR. RABINOWITZ: I'm sorry, Your Honor.

6 Q Had you ever fired this weapon, sir?

7 A Yes, sir, I had.

8 Q You had fired that weapon?

9 THE COURT: That's what he said. Let's move on.

10 Q And who did you fire it at?

11 A I didn't fire it at anyone.

12 Q You didn't fire it at anyone.

13 MR. RABINOWITZ: I'm sorry, Your Honor.

14 Q Isn't it true, sir, that you fired that weapon at
15 your common law wife, Joyce L. Gray?

16 A No, sir, it is not true.

17 Q Did you fire that weapon shortly after you had just
18 had an argument with Joyce Gray?

19 A It's true I fired the weapon, in the house, after I
20 had an argument with Joyce Gray.

21 Q In her general direction, sir?

22 MR. DICK: Your Honor, I object to the relevance
23 of it.

24 THE COURT: Objection is sustained. Let's move on,
25 Mr. Rabinowitz.

1 MR. RABINOWITZ: Okay.

2 Q Now, when you left with Gene, how many cars did
3 you take?

4 A When we left my house, on the 28th?

5 Q Yes, sir.

6 A We went in two cars.

7 Q Who was in each car?

8 A Gene Robinson was driving the Cadillac. Sims was in
9 the front seat. I was in the back seat. Halsell was driving
10 the blue Matador.

11 Q Do you recall giving a statement to Lt. Calangelo and
12 Sgt. Salerno on March the 2nd, 1978, the statement I previously
13 talked to you about, do you recall that?

14 A I recall.

15 Q And do you recall . . . Okay, do you recall being
16 asked the question by Sgt. Salerno, "Okay, did you see them
17 in the car?" And your answer, "Yes."

18 You know in fact--

19 MR. DICK: Page, please.

20 MR. RABINOWITZ: Page 5.

21 Q "You know in fact that it was B. B., the one you
22 know as B. B.?"

23 Your answer: "B. B. was driving the car and Sims
24 was riding in the front with him."

25 Do you recall giving that statement and giving that

1 information?

2 A I recall giving that statement, but I think . . .

3 Q Is that your--

4 MR. DICK: Your Honor, he's already verified that
5 he gave the statement. This is repetitive. He's saying is
6 that your signature on that. I object to it.

7 THE COURT: Just ask him the question and let's
8 get his answer, Mr. Rabinowitz.

9 Q Are these your initials on the bottom of this page?

10 A Yes, sir.

11 Q And do you recognize these words on this statement?
12 "Do you know in fact that it was B. B., the one you know as
13 B. B.," and your answer, "B. B. was driving the car and Sims
14 was riding in front with him?"

15 A That's in the blue Matador, parked in front of my
16 house. It's different.

17 Q It's a different time now?

18 A That question, it's in relation to me first leaving
19 my apartment. When I came downstairs Terry Sims and B. B.
20 Halsell was sitting in the front of the blue Matador.

21 Q Okay. Where did you drive to, Mr. Baldree?

22 A I got in the back seat of the Cadillac and went to
23 sleep. When I woke up, we was at the Port of Nations Motel.

24 Q And who checked in?

25 A B. B. Halsell.

1 Q And who did you share a room with?
2 A With B. B. Halsell.
3 Q And why did you share a room with B. B.?
4 A Probably because we were both using drugs.
5 Q And did you shoot any drugs that night?
6 A No, sir.
7 Q What time did you arrive there?
8 A I don't remember exactly. It was dark.
9 Q Okay. Did you make a telephone call that night to
10 anyone?
11 A I made two of them.
12 Q And who did you call?
13 A I called Joyce Gray in Jacksonville.
14 Q And do you recall on that night when you called
15 Joyce Gray having said to her, "I don't know where I am, I'm
16 lost, I don't know where I am. Come pick me up."
17 A No, sir.
18 Q Now, did anyone steal a car on the 28th?
19 A The car was stolen on the 28th.
20 Q Who stole it?
21 A Gene Robinson, Halsell. They told me they had
22 stole it the next morning. I didn't see them or go with them.
23 Q Okay. Halsell and Robinson told you they stole the
24 car?
25 A That's correct.

1 Q During the time that you drove down to Tampa did
2 you have any car trouble there?

3 A Yes, we did. We had a wheel that was on the back
4 of my car that was bent. It had been bumped against the curb
5 or something. We had to stop and get it changed.

6 Q Okay. You did stop and change it?

7 A Correct.

8 Q And when was the discussion of the robbery brought
9 up?

10 A The morning of the 29th.

11 Q Okay. And who brought up the discussion of the
12 robbery?

13 A Gene Robinson.

14 Q Now, you claim that someone bought some nail polish;
15 is that correct?

16 A Yes, sir.

17 Q And who bought the nail polish?

18 A The best I can remember, it was Halsell.

19 THE COURT: Let's move on, Mr. Rabinowitz, please.

20 MR. RABINOWITZ: Okay.

21 THE COURT: I've had enough of that, Mr. Rabinowitz.
22 Let's move on. This has gone far enough. Let's move on.

23 MR. RABINOWITZ: Yes, Your Honor.

24 MR. HEPPERMAN: Your Honor, may counsel approach the
25 bench?

1 THE COURT: No. Move on.
2 Q When was the hot car picked up?
3 A It was picked up immediately prior to the robbery.
4 Q And who drove it to the motel, who drove it to the
5 site of the robbery, excuse me?

6 A Sims drove it to the site of the robbery.
7 Q Isn't it true that you previously made a statement
8 that you drove it?

9 A No, sir.
10 Q Do you recall being asked the question by Sgt.
11 Salerno--

12 THE COURT: Mr. Rabinowitz, he denied that he made
13 the statement. There's a way to impeach him if you wish.
14 Now let's move on.

15 Q What was the purpose of B. B. and Mr. Robinson,
16 what was their purpose out there?

17 A They were there to help us in the aid of problems.

18 Q Were they there as lookouts for you?

19 A No, sir. They was there more for the purpose in
20 case we got run out of there, or had to leave the car, possibly
21 they could pick us up.

22 Q Were they armed?

23 A Yes, sir.

24 Q And what was B. B. Halsell carrying?

25 A He was carrying a thirty-eight with a four inch

1 barrel.

2 Q What were you wearing on that day?

3 A I was wearing a red and black mixed color slipover
4 sweater, and blue trousers.

5 Q And what was Mr. Sims wearing?

6 A He was wearing Levis, a white T-shirt, and a blue
7 waist-length leisure jacket.

8 Q Now, where was Sims all during the robbery?

9 A Where was Sims all during the robbery?

10 Q Um hum. Did Sims ever come to the back of the store?

11 A Yes, sir.

12 Q Do you recall having made the statement that he
13 never did come to the back of the store?

14 A I don't recall it.

15 THE COURT: Let's move on, Mr. Rabinowitz. He said
16 he doesn't recall making the statement. If you wish to
17 impeach him, there's a way to do it. Let's move on,
18 please.

19 MR. RABINOWITZ: Your Honor, can I--

20 THE COURT: You move on.

21 MR. RABINOWITZ: Yes, Your Honor.

22 Q After the first shots that you heard, you ran to the
23 front of the store; is that correct?

24 A No, sir. I grappled a minute or so with the pharma-
25 cist trying to get him loose from my arm and gun. And as soon

1 as I could get loose from him I went to the front of the store.

2 Q And you were carrying a loaded gun at that time?

3 A Yes, sir.

4 Q Did you discharge that weapon?

5 A Yes, sir, I did.

6 Q Now how many nights did Mr. Sims stay at your apart-
7 ment?

8 A The robbery happened on Thursday night. He stayed
9 there until Sunday morning.

10 Q Was Joyce Gray living there during that time?

11 A Yes, sir, she was.

12 Q On what day did you bring Sims to his trailer in
13 Lake City?

14 A That was on Sunday morning.

15 Q Do you recall what this trailer looked like?

16 A I do. I remember an odd feature about it. It had
17 an extended bedroom in the center of the trailer.

18 Q And what day did you pick Sims up to carry him to
19 Dr. Dunbar?

20 A It was Tuesday, January 3rd.

21 THE COURT: Mr. Rabinowitz, he's already testified
22 to all this once. I heard him. Please let's don't be
23 so repetitious. Please move on.

24 MR. RABINOWITZ: Yes, Your Honor.

25 Q What time did you pick him up?

1 A I really don't know for sure.

2 Q Were you taking any drugs on the third day of
3 January, when you picked him up?

4 A No, sir.

5 Q And where did you meet this Dr. Dunbar?

6 A The first time I met him was at the Federal Courthouse
7 in Brunswick, Georgia.

8 Q And what were you doing at the Federal Courthouse?

9 A I went up with Gene Robinson. He had a trial going.

10 Q And was Dr. Dunbar also on trial?

11 A Yes, sir.

12 Q What was he on trial for?

13 A The sale of prescriptions and conspiracy to smuggle
14 Qualaludes.

15 Q How long were you at Dr. Dunbar's that day?

16 A Would you ask that question again?

17 Q How long did you spend at Dr. Dunbar's?

18 A At his office?

19 Q Yes, sir.

20 A Approximately forty-five minutes.

21 Q Now, you met a Lt. Calangelo during the course of
22 this case, did you not?

23 A Yes, sir.

24 Q And you met him while you were in Cobb County in
25 jail, did you not?

1 A Yes, sir.

2 Q And when you met Lt. Calangelo did Lt. Calangelo
3 bring you one single photograph of a person? Did he show you
4 one photograph of a man?

5 A No, sir.

6 Q Did he ever show you one photograph of a man and
7 identify the man to be Terry Melvin Sims?

8 A No, sir. I don't remember if he did.

9 Q Did you ever hear the name Terry Melvin Sims, sir,
10 prior to the time that--Strike that question.

11 Did you ever hear the name Terry Melvin Sims mentioned
12 by the police?

13 A Yes, sir.

14 Q Okay. And when you heard that name what did you
15 tell the police?

16 A I told them I did not know him.

17 Q And didn't you deny that on at least five occasions,
18 sir?

19 A Yes, sir.

20 Q And wasn't it until the time that the police broached
21 making a deal with you that you ever mentioned that you knew
22 a man named Terry Melvin Sims?

23 A Yes, sir.

24 Q And isn't it likewise true that at one point in time
25 the State came and offered you a deal pleading to a felony

1 charge and you rejected that deal and rejected to give them
2 any information on the alleged robbery-homicide?

3 A I'm not sure about that.

4 Q What deal did you get in exchange for your testi-
5 mony?

6 THE COURT: He testified two midemeanors he got a
7 year apiece and they are running consecutively. Please,
8 Mr. Rabinowitz, let's not be repetitious.

9 Q Mr. Baldree, how many times have you been convicted
10 of a crime, sir?

11 A Approximately twelve.

12 Q And are you aware of your reputation in the commu-
13 nity for truthfulness?

14 MR. DICK: Objection. That's irrelevant, Your
15 Honor.

16 THE COURT: Objection sustained.

17 Q Mr. Baldree, who shared a cell with you for the
18 last six months?

19 A B. B. Halsell.

20 Q Have you talked about this case?

21 A Yes, sir.

22 Q Do you know a man by the name of Jack Baldwin?

23 A Yes, sir.

24 Q And did you ever talk to a man by the name of Jack
25 Baldwin?

1 A Yes, sir.

2 Q Do you ever recall making a statement to Jack
3 Baldwin at the Brevard County Jail to the effect that you would
4 do anything to save your own skin?

5 A I did not make that statement.

6 Q Did Mr. Baldwin say anything to you, sir?

7 A He said I could refuse to testify if I wanted to.
8 I had already gotten my issue (sic).

9 Q Now, when you drove to Tampa you say you bought some
10 lock pullers; is that correct?

11 A Yes, sir.

12 Q And do you know where those lock pullers are, sir?

13 A I think the police have most of them.

14 Q Okay. And you say you dropped the gun in a lake
15 someplace out here?

16 A Yes, sir.

17 Q Did you take the police out to find that gun?

18 A Yes, sir.

19 MR. RABINOWITZ: Could I have just one moment, Your
20 Honor?

21 THE COURT: Yes, sir.

22 Q How many bedrooms were in your apartment in Jackson-
23 ville?

24 A Two bedrooms.

25 Q And do you know a man by the name of Terwayne Gale?

1 A Very vaguely.

2 Q Do you know what Mr. Gale looks like, sir?

3 A I'm not sure if I know him or not.

4 MR. DICK: Objection. Irrelevant and immaterial.

5 THE COURT: The objection is sustained.

6 Any further direct?

7 MR. DICK: No, sir.

8 THE COURT: Fine. You may come down, sir.

9 Your next witness.

10 MR. DICK: The State calls Judith Thompson, Your
11 Honor.

12 THE COURT: Judith Thompson, please.

13 MR. HEFFERNAN: Your Honor, could counsel approach
14 the bench?

15 THE COURT: You may.

16 MR. HEFFERNAN: Thank you.

17 (Whereupon there was had the following conference.
18 at the bench.)

19 MR. HEFFERNAN: Your Honor, for the record, we would
20 like to take issue with the Court having cut short Mr.
21 Rabinowitz' cross examination as to his attempt to
22 impeach this witness. I think that his character and
23 all those things about which he has knowledge which are
24 relevant to this case are at issue before this jury.

25 THE COURT: Because of the repetitiveness I refuse

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PAGE 469 MISSING DUE TO NUMBERING ERROR

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1 to allow this case to be dragged out interminably. He's
2 made his point three or four times, and the Court con-
3 sidered that more than sufficient. Now let's move on.

4 MR. HEFFERNAN: Thank you, Your Honor.

5 THE COURT: Swear the witness, please.

6 WHEREUPON:

7 JUDITH THOMPSON

8 a witness herein, having been first duly sworn, was examined
9 and testified as follows:

10 THE COURT: You may inquire.

11 MR. DICK: Thank you, Your Honor.

12 DIRECT EXAMINATION

13 BY MR. DICK:

14 Q Mrs. Thompson, would you give us your full name,
15 please?

16 A Judith H. Thompson.

17 Q Where do you reside, Miss Thompson?

18 A 123 Variety Tree Circle, Altamonte Springs.

19 Q And what is your occupation, ma'am?

20 A I'm the Assistant Executive Director of the American
21 Heart Association.

22 Q Where is that located?

23 A 237 East Mark Street, Orlando.

24 Q Miss Thompson, I want to take you back to the time
25 of the 29th of December, 1977, in the Longwood Village Shopping

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PART D

POINT I

THE TRIAL COURT ERRED IN SUMMARILY CURTAILING APPELLANT'S CROSS-EXAMINATION OF THE KEY PROSECUTION WITNESS, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENT GUARANTEES TO CONFRONTATION OF WITNESSES AND TO A FAIR TRIAL.

The present issue involves the trial court's sua sponte restriction and summary curtailment of Appellant's cross-examination of the key prosecution witness, alleged accomplice Curtis Baldree. This action involved numerous interjections by the judge throughout the cross-examination and finally an abrupt truncation of cross-examination. The trial judge's reason for his sua sponte actions was not that the questions Appellant was trying to ask were improper or that they covered improper or collateral areas (the prosecution had not objected to the questioning). Rather, the trial court's reasoning was that since the witness had testified to these areas on direct examination, Appellant's cross-examination in these areas was thus repetitive. The trial judge's reasoning was both logically and legally incorrect. This case thus involves both the outright denial of cross-examination and the restriction of the scope of cross-examination in certain areas; it also involves the prejudicial error from the judge's remarks in his repeated interjections during Appellant's questioning of the key prosecution witness.

The key witness for the State was Curtis Baldree. Although initially charged with first degree murder and robbery, he was allowed to plead guilty to two misdemeanors in return for

his testimony (R 445-446). Baldree testified that he was in the pharmacy conducting the robbery with Sims and he related details of the planning and carrying out of the robbery. Thus, he was an alleged accomplice and unquestionably a very key witness for the prosecution. Under such circumstances, Appellant's right and need of cross-examination were especially acute.

During the middle of Appellant's cross-examination of Baldree (after repeatedly interjecting throughout the examination), the trial judge abruptly and sua sponte cut off Appellant's cross-examination. The judge simply turned to the prosecutor and asked whether he had any further direct examination, the prosecutor said that he did not, and then the judge sent the witness from the stand and courtroom, and called the next witness:

Q. [by defense counsel] And do you know a man by the name of Terwayne Gale?

A. Very vaguely.

Q. Do you know what Mr. Gale looks like, sir?

A. I'm not sure I know him or not.

MR. DICK [prosecutor]: Objection. Irrelevant and immaterial.

THE COURT: The objection is sustained.
Any further direct?

MR. DICK: No, sir.

THE COURT: Fine. You may come down, sir. Your next witness.

MR. DICK: The State calls Judith Thompson, Your Honor.

THE COURT: Judith Thompson, please.

(Emphasis supplied) (R 467-68). Defense counsel at that point requested a bench conference and entered Appellant's objection to the judge "having cut short" the cross-examination of Baldree (R 468). It was pointed out that "impeachment" of the witness, and "his character and all those things about which he has knowledge which are relevant to this case are at issue before this jury." (R 468). Appellant's objections were to no avail. The trial judge would not consider Appellant's arguments: "Because of the repetitiveness I refuse to allow this case to be dragged out interminably." (R 468-470). The judge said that: "He's made his point three or four times, and the Court considers that more than sufficient" (R 470).

The trial judge's opinion that Appellant's cross-examination was "repetitive" is enigmatic because a reading of the cross-examination reveals plainly that it was orderly and not repetitive. It was not repetitive unless the judge found repetitiousness in the fact that Appellant was questioning in areas that had been testified to in direct examination. And that type of "repetitiveness" is not only proper but it is part of the whole purpose of cross-examination. Moreover, even if a criminal defendant's cross-examination were repetitious, summary and complete truncation would not be the appropriate method for dealing with it.

Although this case also involves the restriction of the scope of cross-examination, an aspect that will be discussed in detail later, it first and more directly involves the total curtailment of that right. Cross-examination, embodied in the

constitutional guarantee of confrontation [e.g., Knight v. State, 97 So.2d 115, 119 (Fla. 1957); Pointer v. Texas, 380 U.S. 400, 404 (1965)], is "an absolute right, as distinguished from a privilege..." Coco v. State, 62 So.2d 892, 894 (Fla. 1953); accord Frost v. State, 104 So.2d 77, 79 (Fla. 2d DCA 1958); Beard v. State, 104 So.2d 680, 682 (Fla. 1st DCA 1958). Any restrictions of that right are subject to "close appellate scrutiny," Salter v. State, 382 So.2d 892, 893 (Fla. 4th DCA 1980), and a judge who restricts cross-examination "may easily abuse his discretion and commit reversible error." Johnson v. Reynolds, 97 Fla. 591, 121 So. 793, 795 (1929). Thus, cross-examination is one of the rights most closely guarded by the courts as it is an "invaluable" tool of the adversary system. E.g. Knight v. State, supra, 97 So.2d at 119. Accordingly the abrogation of the full right to cross-examination is a "constitutional error of the first magnitude," Davis v. Alaska, 415 U.S. 308, 318 (1974), as it is "essential for the due protection of life and liberty," Pointer v. Texas, supra, 380 U.S. at 404, and its "denial or diminution calls into question the ultimate" integrity of the fact-finding process" and requires that the competing interest be closely examined." Chambers v. Mississippi, 410 U.S. 284, 295 (1973). It is considered so critical to a fair trial that limitation of cross-examination is prejudicial error and "no amount of showing of want of prejudice would cure it." Brookhart v. Janis, 384 U.S. 1, 3 (1966); accord Davis v. Alaska, supra, 415 U.S. at 318; Frost v. State, supra, 104 So.2d at 79.

An important factor in this case is that the cross-examination that was curtailed by the trial judge involved the alleged accomplice and key prosecution witness. This factor heightens the error. See, e.g., Porter v. State, 386 So.2d 1209, 1213 (Fla. 3d DCA 1980) (the "vital importance" of cross-examination "is even clearer" where a "key prosecution witness" is involved); United States v. Brown, 546 F.2d 166, 170 (5th Cir. 1977) (the importance of cross-examination is "necessarily magnified" where the witness is the "'star witness', or was an accomplice or participant"). It is also important to note that this is a capital case, a fact which requires special scrutiny of the abrogation of cross-examination. Coco v. State, *supra*, 62 So.2d at 895; Hahn v. State, 58 So.2d 188, 191 (Fla. 1952); Williams v. State, 386 So.2d 25, 27 (Fla. 2d DCA 1980).

In the present case the trial judge "curtailed summarily," District of Columbia v. Clawans, 300 U.S. 617, 631 (1937), Appellant's cross-examination of the state's key witness. Such a "summary denial," Alford v. United States, 282 U.S. 687, 692 (1931), was a prejudicial abuse of discretion. While a trial court does retain discretion over the scope of cross-examination, the prevention of all inquiry is prejudicial error. The discretion of the trial judge does not come into effect until an opportunity for full cross-examination has been allowed. See, e.g., Grant v. United States, 368 F.2d 658, 661 (5th Cir. 1966); United States v. Mayer, 556 F.2d 245, 250 (5th Cir. 1977); *cf.* Johnson v. Reynolds, *supra*, 121 So. at 795.

In the present case the trial judge never reached the

point where his discretion became operative. The trial judge of his own accord summarily stopped Appellant's cross-examination of the key witness. No proper reason was advanced by the judge -- except that it was repetitive of the direct examination. And the lack of proper reason is also shown by the fact that the prosecution did not object or request the examination to be cut off.

Exceptions to the right to full cross-examination are "exceedingly narrow" , State v. Hassberger, 350 So.2d 1, 5 (Fla. 1977), and no legitimate reason exists in the present case. Cross-examination may not be curtailed for the reason that it may establish a defensive matter, e.g., Watson v. State, 134 So.2d 805 (Fla. 2d DCA 1961), because the prosecutor asked similar questions on direct examination, e.g., United States v. Caudle, 606 F.2d 451, 456 (4th Cir. 1979), or because the testimony sought could be brought out by other witnesses, e.g. Frost v. State, supra, 104 So.2d at 80. Consequently the reason advanced by the trial court for completely cutting off Appellant's cross-examination was invalid.

The general principles discussed above have been firmly enforced by this Court. In Coco v. State, supra, the trial judge had prohibited certain questioning because it went to defensive matters and was beyond the scope of direct examination. This Court rejected the trial court's reasoning and found that Coco was denied a fair trial:

Cross-examination of a witness upon the subjects covered in his direct examination is an invaluable right and when it is denied him it cannot be said

that such ruling does not constitute harmful and fatal error.

62 So.2d at 895. Likewise, in Coxwell v. State, 361 So.2d 148 (Fla. 1978), the trial court had sustained objections to the defendant's cross-examination of an accomplice regarding the fact that a third party, not Coxwell, had procured the offense. This Court rejected the trial court's reasoning that the questioning was beyond the scope of direct examination and reaffirmed that cross-examination must be allowed on "matters which are both germane to that witness' testimony on direct examination and plausibly relevant to the defense..." Id. at 152. It was further emphasized that in a capital case "an abuse of discretion by the trial judge in curtailing that inquiry may easily constitute reversible error." Id. Also, State v. Hassberger, supra, held that in dealing with the restriction of a defendant's right to cross-examine "doubts must be resolved in favor of the accused's sixth and fourteenth amendment right to confront witnesses against him." 350 So.2d at 5.

In several respects, the curtailment of cross-examination in the present case is much more egregious than the situations reviewed in Coco, Coxwell, or Frost. The trial court's action in cutting off the examination was summary and sua sponte. If there was really some necessity to control defense counsel's cross-examination, which there surely was not, the proper procedure would have been to rule on specific objections or questions as they arose or to exclude or strike improper answers. Cf. Watson v. State, 134 So.2d 805, 806 (Fla. 2d DCA 1961);

Beard v. State, 104 So.2d 680, 682-3 (Fla. 1958). Total truncation was wholly uncalled for under any construction of the circumstances of this case. In addition, the abrupt action of the trial judge came after he had repeatedly interjected, disrupted, and "interfered with Appellant's cross-examination.

Added to the error of summary denial of cross-examination is the error from the judge's sua sponte restriction of the scope of cross-examination. In general very broad latitude must be given in cross-examination of an adverse witness, especially a key witness. The scope must include a "wide range" of questioning relating to the witness' "motives, interest, or animus" and matters upon which "he may be contradicted by other evidence." Pittman v. State, 51 Fla. 94, 41 So. 385, 394 (1906). See also Embry v. Southern Gas and Electric Corp., 63 So.2d 258, 262-263 (Fla. 1953) ("all matter that may modify, supplement, contradict, rebut, or make clearer the facts testified to in chief"). Appellant's questioning was well within the proper scope.

Throughout Appellant's cross-examination of this key witness prosecution, the trial judge interposed on his own to limit questioning. In all the judge interrupted and told defense counsel to "move on" more than ten times (in 20 pages) during his cross-examination (R 456, 460, 461, 462, 463, 466, 468). It must be reemphasized that judge's reason for interrupting cross-examination was that he believed it to be repetitious -- but the only repetition was that it was exploring testimony brought out in direct examination. And this repetition is not only proper but it is the whole purpose of cross-examination. The trial

judge's reasoning was incorrect. E.g. United States v. Caudle, supra, 606 F.2d at 456-457. The result of the trial court's repeated interference was unjustified limitation of cross-examination in several important areas.

For example, the trial judge told defense counsel to "move on" when he was asking Baldree about his ownership of and experience with the gun that Baldree said he used in the robbery and also about the fact that he had fired that weapon at his wife (R 456). Of itself the ownership and use of the weapon is a detail of the offense which appellant had an absolute right to probe -- it was testified to in direct examination and was certainly relevant to the offense -- but also at that point counsel was attempting to impeach the witness with an inconsistent statement (R 455). This area of cross-examination is also important since in Baldree's direct examination testimony he had tried to minimize his role in the planning of the offense, almost suggesting it was mere happenstance. Baldree had said it was Robinson's idea and that Robinson furnished the weapons just prior to the robbery (R 428, 430, 433). The relevancy of this area of cross-examination cannot be questioned.

Another interruption and restriction occurred while defense counsel was questioning regarding the purchase and use of fingernail polish -- a matter brought out on direct examination (R 428). The judge sua sponte stopped questioning:

Q. [by defense counsel]: And who bought the nail polish?

A. The best I can remember, it was Halsell.

THE COURT: Let's move on, Mr. Rabinowitz, please.

MR. RABINOWITZ: [Defense counsel] Okay.

THE COURT: I've had enough of that, Mr. Rabinowitz. Let's move on. This has gone for enough. Let's move on.

MR. RABINOWITZ: Yes, Your Honor.

MR. HEFFERNAN [Defense counsel]: Your Honor may counsel approach the bench?

THE COURT: No, Move on.

(emphasis supplied) (R 460-61). There was nothing improper in Appellant's questioning and nothing to justify the judge's conduct or the cutting off of questioning. Not only did the judge end questioning without reason but he rebuked the request for a conference at bench.

Another detail upon which Appellant's cross-examination was summarily truncated involved Baldree's testimony in chief that he took Sims to a Dr. Dunbar on January 3, 1978 (R 444). When defense counsel started to inquire the trial judge interrupted, and told counsel that the witness had "already testified to all this once" and instructed counsel not to "be so repetitious." The judge then commanded defense counsel to "move on" (R 463). As in the other areas where the judge interrupted, defense counsel's cross-examination was not repetitive, having never inquired into this area. This was an especially significant area of Baldree's testimony since he had said Sims had been wounded in the offense and that is why he took him to the doctor. Baldree's testimony was questionable -- one witness testified that Baldree was in another faraway city on that date (R 560, 565) and Dr. Dunbar (who did not identify Sims) testified for the State that Robinson, not Baldree, took the wounded man to him

(R 669-670). It was an area plainly relevant to the cause and thus the trial court's sua sponte preclusion of cross-examination was wholly unjustified.

The trial court also sustained an objection to Appellant's questioning of Baldree regarding "Terwayne Gale" (R 467-468). It was also at this point that the court prohibited all cross-examination and sent the witness from the courtroom. Who the court reporter phonetically reported as "Terwayne Gale" was Terry Wayne Gale as previous and subsequent witnesses had testified (R 348-349, 549, 569, 589). One of the theories of the defense was that it was Terry Wayne Gale, not Terry Melvin Sims, who committed the robbery with Baldree and Halsell. Terry Wayne Gale closely resembled Sims in height and hair length and style; Gale was also similar to Sims in general build except that he was a little heavier (R 349, 549). Gale's close resemblance to Sims could have been the cause of the misidentification of Sims. Also, the first officer on the scene said that the perpetrator had a large head (R 526), not a thin head like Sims. Halsell, the other alleged accomplice, had testified that he had been involved in "quite a few crimes" with Gale (R 349) and that he had previously worked in crime with Baldree (R 323-324). All three were from Jacksonville. Other witnesses testified that Gale, Halsell and Baldree were frequent criminal associates (R 548, 549, 556, 588, 590) and that Appellant was not associated with them (R 550). Gale, Baldree and Halsell committed burglaries and robberies for drugs (R 548 549, 556). Thus, Appellant's attempted cross-examination of Baldree regarding Gale involved

a central point in the case and certainly would have been relevant to the subject of Baldree's testimony. The cross-examination also would have revealed bias by showing a motive for Baldree to lie in order to protect his "associate" while at the same time getting a deal by identifying Sims. The cross-examination also would have laid the foundation for impeachment by other contradictory evidence. Another principle is also involved in this area of restricted cross-examination: a criminal defendant must have great latitude in showing that another person may have committed the offense. See State v. Hawkins, 260 N.W. 2d 150 (Minn. 1970); Holt v. United States, 342 F.2d 163 (5th Cir. 1965); cf. Corley v. State, 335 So.2d 849 (Fla. 2d DCA 1976); Watts v. State, 354 So.2d 145 (Fla. 2d DCA 1978). The court's preclusion of cross-examination in this relevant and important area was an error of constitutional dimension.

One further important area where the judge interposed himself was Appellant's attempt to question Baldree about the remarkable deal he received in exchange for his testimony (R 466). This time however not only did the judge preclude questioning and prevent the witness from answering, but the judge himself gave an answer. Again, the judge's reasoning was that Appellant could not question in the area because it was "repetitious" (R 466). The court was wrong, Appellant had never examined Baldree about the deal he had made. When Appellant asked Baldree what deal he had received, the judge interrupted to give an answer and to tell counsel to move on:

THE COURT: He testified two misdemeanors
he got a year apiece and they are running

consecutively. Please, Mr. Rabinowitz, let's not be repetitious.

(R 465-466). The judge's action was wholly unjustified. Baldree had testified on direct examination that he had pleaded guilty to two misdemeanors and that "his part of the deal" was "to tell the truth" (R 445-446).

An alleged accomplice's deal with the state is one of the most important areas affecting the witness' credibility. It is thus one of the areas most strictly guarded by the courts. E.g., Davis v. Alaska, 415 U.S. 308 (1974); Cowheard v. State, 365 So.2d 191, 193 (Fla. 3d DCA 1979); Holt v. State, 378 So.2d 106 (Fla. 5th DCA 1980); United States v. Mayer, 556 F.2d 245 (5th Cir. 1977). Appellant was denied that right by the trial judge. It is not merely the bare facts that are relevant, as the trial judge assumed. Also highly relevant are the details, expectations, and reasons behind the deal. Equally important is the witness' demeanor in responding to the probing inquiry [Baldree had told Sims' prior attorney that he would do anything to keep the deal (R 659)]. The summary abrogation of cross-examination was fatal error.

There is one final aspect of the judge's actions which must be considered. The court's remarks themselves were prejudicial and emphasized the error. The trial judge's repeated sua sponte interjections, commands and admonitions to counsel throughout Appellant's examination of the key state witness, certainly could have affected the jurors. It could have conveyed to the jury that the judge viewed defense counsel's

questions or areas of questioning to be insignificant or irrelevant. An important example is the judge's sua sponte giving an answer and stopping cross-examination when Appellant tried to ask Baldree about the deal he had made for his testimony. See Esposito v. State, 243 So.2d 451 (Fla. 2d DCA 1971). By giving an answer and stopping inquiry, the probability is great that the judge conveyed to the jury that Appellant's question was somehow irrelevant and that the deal Baldree got was of little significance as it related to his credibility.

The judge repeatedly interrupted counsel's cross-examination, telling him to "move on", "I've had enough", and "You move on." These continual interjections, apart from the restriction of examination, at best hindered counsel and could have "inhibit[ed] counsel from giving full representation to his client." Hunter v. State, 314 So.2d 174 (Fla. 4th DCA 1975). As we have shown, there was no reason for the judge's interjections; defense counsel in no way had been argumentative, obstreperous, or was asking improper questions, and throughout the trial was fully respectful to the court. Cf. Brown v. State, 367 So.2d 616, 620, n. 3 (Fla. 1979). The influence of the trial judge on the jury is "immense", Skelton v. Beall, 133 So.2d 477, 481 (Fla. 3d DCA 1961), accord Raulerson v. State, 102 So.2d 281 (Fla. 1958), especially in the trial of a capital case, Williams v. State, 143 So.2d 484, 488 (Fla. 1962). Accordingly this Court recognized:

[A] trial court should avoid making any remark within the hearing of the jury that is capable directly or indirectly, expressly, inferentially, or by innuendo of conveying

any intimation as to what view he takes of the case or that intimates his opinion as to the weight, character, or credibility of any evidence adduced.

Leavine v. State, 109 Fla. 447, 147 So. 897, 903 (1933); accord Seward v. State, 59 So.2d 529 (Fla. 1952). As held in Robinson v. State, 161 So.2d 578 (Fla. 3d DCA 1964):

Where there is simply a doubt...
that an accused has been prejudiced by
a remark of the court, we must grant
a new trial.

Id. at 579. In the present case the cumulative and repeated interjections by the trial judge "militated against [Sims] receiving a fair trial." Williams v. State, supra, 143 So.2d at 488.

Reviewing the record in this case it appears that the trial judge was motivated in his actions during Appellant's cross-examination by a desire to expedite the proceedings. In the abstract this can be a laudible objective. However, "considerations of due process outweigh those of economics." Land v. State, 293 So.2d 704, 708 (Fla. 1974). The judge's desire for hast in Appellant's cross-examination of Baldree did not justify the abrogation of Sims' absolute right to confrontation. What occurred should not be countenanced in a capital case. This cause must be remanded for a new trial.

POINT II

THE TRIAL COURT REVERSIBLY ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL TO THE EXPRESS REFERENCE TO SIMS' "MUG SHOT" WHERE THE RESULTING INFERENCE OF PRIOR CRIMINAL ACTIVITY WENT IMPROPERLY TO A KEY FACTOR IN SIMS' DEFENSE, THEREBY DENYING APPELLANT A FAIR TRIAL.

Appellant, called as his witness the chief investigator

POINT 1: THE TRIAL COURT ERRED IN SUMMARILY
CURTAILING APPELLANT'S CROSS-
EXAMINATION OF THE KEY PROSECUTION
WITNESS, IN VIOLATION OF THE SIXTH
AND FOURTEENTH AMENDMENT GUARANTEES
TO CONFRONTATION OF WITNESSES AND
TO A FAIR TRIAL.

Apparently recognizing the impropriety of what occurred in the trial court, the State seeks to avoid the error by arguing that the issue was not sufficiently preserved for review. It is an argument frequently recited by the State, but is one that is wholly inappropriate in the present case. Defense counsel objected when the trial court summarily cut off cross-examination, sending the witness from the courtroom (R 468) and had been twice rebuked in his requests for bench conferences during the cross-examination (R 460-61, 462).

The restrictions on cross-examination in the present case are of a far broader scope than the State attempts to portray. The facts are not in dispute. In this capital case, without any valid reason (and the State cites none in this Court and did not object below) the trial judge summarily interrupted and interjected repeatedly throughout cross-examination with prejudicial comments limiting relevant questioning and then again sua sponte abruptly cut off cross-examination of the key prosecution witness. It is illogical to argue that the judge did not have the opportunity to rule on the legal issues involved since it was the judge himself who wholly restricted Sims' cross-examination. Nevertheless, defense counsel, when finally granted the opportunity to do so by the judge, objected to the cutting off and restriction of cross-examination.

A common sense reading of the record shows by the manner of the judge's conduct that the judge's mind was set and no amount of protestations could change it. This is true because of the defective reasoning of the trial judge -- he thought that cross-examination was repetitive if it covered areas brought out in direct examination. Of course, such reasoning is diametrically opposed to the law and to the purpose of cross-examination.

Therefore, the judge's reason for restricting and cutting off cross-examination had nothing to do with the subject matter of the questioning. Accordingly, any attempts by defense counsel to further object or further proffer would have been futile. What defense counsel was asking was simply not the question in the judge's mind; rather the judge was concerned more with the length of time in the examination and his mistaken notion of repetitiveness. To say that defense counsel should have further objected is contrary to common sense. Cf. Douglas v. Alabama, 380 U.S. 415 (1965); Brown v. State, 362 So.2d 437 (Fla. 4th DCA 1978).

There was nothing valid to explain why the judge felt that he had to interject himself so fully into cross-examination. Matters of strategy as to how or whether to impeach a witness or methods of proof are "exclusively within the province of defense counsel" and the court "has no role in limiting counsel ...". Coxwell v. State, 361 So.2d 148, 151 n. 9 (Fla. 1978).

This case involves a very broad infringement of Sims' absolute constitutional right to confrontation of witnesses. It involved not only the restriction of the scope of cross-examination

certain material areas, but it also involved the very serious action of summary and total prohibition of cross-examination. Both of these restrictions on the right to confrontation are constitutional errors of the first magnitude. As to the restriction of the scope of cross-examination, while a trial judge does retain discretion, that discretion is narrowed because of the fundamental nature of the right involved and a judge "may easily abuse his discretion." Johnson v. Reynolds, 97 Fla. 591 121 So. 793, 795 (1929); Coxwell v. State, supra, 361 So.2d at 152. The unreasoned discretion in this case did not outweigh the fundamental constitutional right to cross-examine in areas germane to the case. As to total prohibition of cross-examination, the judge does not have discretion. The prevention of all inquiry is an absolute constitutional violation, and thus it is considered prejudicial error and "no amount of showing of want of prejudice would cure it." Davis v. Alaska, 415 U.S. 308, 318 (1974). See also Alford v. United States, 282 U.S. 687, 692 (1931).

It is the summary, sua sponte abrogation of cross-examination that distinguishes this case from the situation where one question has been precluded after objection. For example in Welch v. State, 342 So.2d 1070 (Fla. 3d DCA 1977), relied upon by the State, defense counsel had already asked the question and had received a negative answer. The Court held that the question counsel proposed to ask was in fact improper. The present case is of course different because the trial court did not rule that any question was improper but rather abruptly cut-off examination.

Another case relied upon by the State is Slaughter v. State, 301 So.2d 762 (Fla. 1974). No facts and no explanation of the circumstances are mentioned in the opinion. However this Court did say that "redundant examination may be precluded." Id. at 767. The present case, however, does not involve such a redundant question. Defense counsel's cross-examination had been orderly, specific and followed a natural progression of questioning. Although the trial judge referred to repetitiveness, as previously discussed, such a belief was mistaken. Similarly distinguished is Chandler v. State, 366 So.2d 64 (Fla. 3d DCA 1979) where defense counsel was precluded from asking one question, but had already brought out the same evidence in general terms. The same situation was involved in Leavine v. State, 109 Fla. 447, 147 So. 887 (1933). Under such circumstances where cross-examination has already brought out the testimony that is sought by the prohibited question, something in addition to the answer already given must be shown to establish prejudicial error. Such reasoning does not apply, and the State has cited no case in which it was applied, where as in the present case cross-examination was summarily cut-off after repeated sua sponte interruptions and restrictions. The situation in the case-at-bar was very much different and of much broader scope than those involved in the cases cited by the State.

POINT II: THE TRIAL COURT REVERSIBLY ERRED IN DENYING APPELLANT'S MOTION FOR MIS-TRIAL TO THE EXPRESS REFERENCE TO SIMS' "MUG SHOT" WHERE THE RESULTING INFERENCE OF PRIOR CRIMINAL ACTIVITY WENT IMPROPERLY TO A KEY FACTOR IN SIMS' DEFENSE, THEREBY DENYING APPELLANT A FAIR TRIAL.

PART E

POINT I

THE TRIAL COURT DID NOT IMPROPERLY
CURTAIL OR RESTRICT CROSS-EXAMINATION.
IN ADDITION, THE TRIAL JUDGE'S COMMENTS
DID NOT PREJUDICE APPELLANT.

Appellant maintains that the trial judge improperly denied defendant his right to cross-examination, restricted the scope of cross-examination, and committed prejudicial error through improper judicial comments.

Appellee maintains that the defendant did not show any error at the trial level by failing to object until the end of cross-examination, failing to object specifically enough at the end of cross-examination, and failing to proffer testimony or at least state how curtailment or restriction of cross-examination at any given point would prejudice him. As a result, Appellee waived any objection he might have had and cannot now complain to the appellate court.

In Leavine v. State, 147 So. 897 (Fla. 1933) the court stated:

"Whether error has been made to affirmatively appear, however, in this instance is another question. In the first place, the record does not disclose affirmatively what answer, that is to say, what testimony, counsel expected from the witness by the question. If the witness had answered in the negative and counsel expected such answer, no practical harm was done. It cannot be assumed that that thought was in counsel's mind which might suit his purpose better or an assignment or error, or that the witness would have given that answer which would have impaired his testimony. How then may it be determined that the effect of the court's ruling was

prejudicial error except by assuming that the witness would have given such an answer as would have affected his credibility?

The witness had already testified on cross-examination that he did not expect to be benefited by testifying in this case but felt that he should be "considered a little bit"; that the state had promised him nothing for testifying in the case; that Thomas did say to him that if he "would turn State evidence in this case that he (Thomas) would see that I (Palmer) got off with a light sentence." So it is impossible to say from the testimony given by him just what his answer to the question would have been or what answer counsel expected. On redirect examination the witness did say that he voluntarily took the witness stand in the first case and that he had not been called to the stand by the State.

It is important that the plaintiff in error should make the alleged error affirmatively to appear from the record. That rule needs the citation of no authority, as it is well settled in this state."

at 903

In Slaughter v. State, 301 So.2d 762 (Fla. 1974) this Court noted that:

"In respect to point ten, supra, appellants were merely curtailed in their cross-examination of certain of the state's witnesses. However, appellants have failed to establish that continued questioning would lead to or bring out new facts tending to discredit the state's case in chief. Certainly, redundant examination may be precluded when each matter has already been thoroughly presented. Leavine v. State, 109 Fla. 447, 147 So. 897 (1933)

at 767

In Welch v. State, 342 So.2d 1070 (Fla. 3d DCA 1977) appellant argued that cross-examination had been unduly restricted. Defense counsel sought to impeach the witness. The witness answered in the negative to the questions. At this point the judge sustained a prosecution objection to the next question. At a side bar conference, defense counsel proffered his theory of what information he hoped to gain through his question to the trial court. However, no evidence to support this theory was proffered and the trial court refused to allow this line of questioning. In affirming the trial judge's decision the court noted that:

"Linda had already been questioned by defense counsel as to whether her husband had told her he was going to seek revenge against the defendant and she denied he told her this. Further, defense counsel admitted to the judge he had no evidence to support his theory that Linda's husband had put her up to testifying as she did on direct examination. Defense counsel failed to establish that continued cross-examination with respect to the rule to show cause would bring out new facts to discredit Linda; therefore, the restriction of such testimony which, in effect, would only be redundant, did not constitute an abuse of discretion. See Slaughter, supra."

at 1071

In Chandler v. State, 366 So.2d 64 (Fla. 3d DCA 1978)

the court noted that:

"Trial courts enjoy a certain discretion in the ruling on the admissibility of evidence. Simply, because a defendant thinks that tendered evidence might be beneficial does not make its rejection reversible error. Cf. the principle of law in Rodriguez v. State, 327 So.2d 903 (Fla. 3d DCA 1976). Nevertheless, where evidence tends in any way, even indirectly, to prove a defendant's innocence, it is error to deny its admission. See Watts v. State, 354 So.2d 145 (Fla. 2d DCA 1978). The true test then is whether the tendered condensed version of the taped conversation was relevant to the defense presented. The defendants have failed to present to the trial court or to this court any reasonable theory upon which the admission of the condensed version of the tape would have helped prove their defense."

at 70

In the instant case defense counsel failed to demonstrate how restriction of cross-examination prejudiced him at all, let alone in a fundamental way. No objection was made until the completion of cross-examination. Upon the completion a generalized objection was made. Lack of an objection distinctly stating specific grounds fails to preserve the matter for appellate review. Castor v. State, 365 So.2d 701 (Fla. 1978). Bassett v. State, 392 So.2d 1025 (Fla. 5th DCA 1981) In the instant case, defense counsel objected on the grounds that the examination of witness's "character, and all those things about which he has knowledge which are relevant to this case", was being unduly restricted. (R 468) Defense counsel did not say why.

In Wallace v. State, 41 Fla. 547, 26 So. 713,722 (1899)

the court stated:

"No grounds of objection were stated in the objections to the testimony relating to Mary Richardson, and we need not further consider the assignment of error based thereon. It is argued, under these assignments, that defendant was forced to give testimony relating to other offenses that might subject him to criminal prosecution, but no objection was interposed upon that ground, nor did defendant claim any supposed privilege of not answering on the ground of self-crimination. We cannot, therefore, consider that objection as it is presented for the first time in this court. Camp v. Hall, 39 Fla. 535, 22 South. 792.

at 721

In the instant case, Appellant claims error in regard to an allegedly improper restriction of a line of questions concerning witness Baldree's ownership and use of guns. Appellant maintains that defense counsel had an absolute right to probe this area. Appellant fails to mention, however, that defense counsel had a sufficient opportunity to probe this area. The witness answered a question as to ownership and that he had fired the weapon and particularly had fired it at his common law wife. An objection was made at this point as to the relevance of whether or not the witness had ever fired the gun at his common law wife. The defense counsel failed to offer any explanation as to this question's relevance and acquiesced compliantly with the judge's request to "move on" by simply stating "okay". The questioning had come to a logical conclusion. All of Appellant's questions had been answered, and defense counsel offered no

explanation of any intention to ask more questions in the area, nor of their relevancy if he did so intend. (R 456) As previously stated in Leavine:

"How then may it be determined that the effect if the court's ruling was prejudicial error except by assuming that the witness would have given such an answer as would have affected his credibility."

at 903

The same argument must be asserted as to Appellant's contention that error occurred in allegedly restricting questioning as to fingernail polish. (R 428) Counsel's question as to who bought the nail polish was answered. Counsel then failed to state whether he had any further questions on the subject or the nature or relevancy of such questions. Defense counsel did request to approach the bench, however nothing further was added for the record. In Thomas v. State, 394 So. 548, 549 (Fla. 5th DCA 1981) defense counsel inquired whether he could make a motion after the jury was excused. Defense counsel's request was denied. Consequently, the motion was never made then or later. Therefore, the objection was waived, and any error, other than fundamental error couldn't be reviewed on appeal.

In regard to Appellant's questioning of Baldree as to his connection to Dr. Dunbar, all questions were answered completely. Again, defense counsel said nothing. In addition, it seems logical to assume that perhaps the trial judge took exception to the style, not the substance, of defense counsel's

questions. Though such exception might under some circumstances be objectionable to, it is not nearly so egregious as in regard to substance. Also, Appellant's questioning on this subject did not end with the judge's admonition. Further questions on the subject immediately followed. (R 464)

In Greene v. Wainright, 634 F.2d 272 (5th Cir. 1981) the court held that a trial judge has discretionary authority to restrict scope of cross-examination once the defendant has been permitted sufficient cross-examination. Here, the defendant was permitted cross-examination on a wide variety of subjects prior to its completion. At the completion of the cross-examination defendant proffered no specific, valid reason or explanation as to why questioning should not end at that point. Defendant failed to show how he was substantially prejudiced.

Nor has Appellant shown on appeal how curtailment of cross-examination fundamentally prejudiced him. Appellant maintains that curtailment of questioning concerning Terry Gale fundamentally prejudiced his case. Yet prior to that point in the trial only a few short questions as to Gale's appearance and familiarity had been asked witness Halsell. Baldree had also been asked whether he knew Gale and knew what Gale looked like. This was essentially all Halsell had been earlier asked. When the State objected to its relevancy, defendant did not respond. At that point in the proceedings neither the trial judge nor the prosecutor had any way of knowing from the nature of the question thus far asked whether or not there indeed was any relevancy to this line of inquiry. Defendant's silence simply served to

emphasize that the State's objection as to irrelevancy must be correct.

It is difficult to perceive how the Appellant was substantially prejudiced by the trial judge's comments. Primarily, these comments were confined to a simple admonition to "move on" or something equally inoffensive. The trial judge did however say considerably more at one point. Appellant is correct when he states that the trial judge recited an answer to a defense question. (R 466) The judge stated that Baldree had gotten a sentence of one (1) year each for two (2) misdemeanors to run consecutively. Assuming arguendo that this were error, the nature of the answer dictates that it is not reversible error in that the jury did not hear something they had not been aware of previously. In fact, the jury heard the same information on at least two (2) other occasions, both in the opening statement and in the examination of witness Halsell.